Supreme Court, U.S.
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No. ___

IN THE
Supreme Court of the United States

OCTOBER TERM, 1999

THE YOUGHIOGHENY AND OHIO COAL COMPANY,
Petitioner,

v.

EVELYN MILLIKEN, Widow of Harold Milliken, and
DIRECTOR, WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

After a United States Court of Appeals has held that the Administrative Law Judge properly denied a claim for black lung benefits, is the claimant nonetheless entitled to mount a claim for benefits by reasserting theories raised and rejected in the first round of proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, The Youghiogheny and Ohio Coal Company states that its parent corporation is Quaker Coal Company, a privately-held company, and that no publicly-held company owns 10% or more of the corporation stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS ENTERED BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit dated December 29, 1999 is reported at 200 F.3d 942, and is set forth in the Appendix at 1a-34a. The September 30, 1998 decision and order of the Benefits Review Board is set forth in the Appendix at 35a-46a. The July 16, 1997 Supplemental Decision and Order on Remand by the Administrative Law Judge is set forth in the Appendix at 47a-57a. The June 21, 1995 Decision and Order of the Benefits Review Board is set forth in the Appendix at 58a-66a. The April 15, 1993 Decision and Order – Denying Modification by the Administrative Law Judge is set forth in the Appendix at 67a-80a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit denied The Youghiogheny and Ohio Coal Company's ("Y & O") petition for review of the decisions of the Benefits Review Board and ALJ on December 29, 1999. On February 10, 2000, Y & O filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The Sixth Circuit denied Y & O's Petition on March 2, 2000.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1994) to review the decision of the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit had jurisdiction pursuant to 33 U.S.C. § 921(c) (1994).

STATUTE AT ISSUE

> Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) of this title) in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if

> any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

33 U.S.C. § 922 (1994).

STATEMENT OF THE CASE

In this case, Respondent Milliken sought an agency order directing her deceased husband's former employer, The Youghiogheny & Ohio Coal Company ("Petitioner" or "Y&O"), to pay her black lung benefits. Y&O successfully defeated her claim. The final resolution came after a lengthy process that involved proceedings before the District Director of the Office of Workers' Compensation Programs, an Administrative Law Judge ("ALJ"), the Benefits Review Board ("BRB"), and ultimately the United States Court of Appeals for the Sixth Circuit. The trier of fact, the ALJ, denied benefits; the BRB overturned the ALJ and granted benefits; and the Court of Appeals affirmed the ALJ and rejected Respondent's claim for benefits. Petitioner's Appendix 5a-6a ("Pet. App. ___"). The Sixth Circuit did not remand to the agency, ALJ, or BRB for any further proceedings.

Undeterred, one year later, Respondent simply went back to the District Director seeking "modification" of the prior order denying benefits by insisting that the prior result was in error based on a theory that had been raised in a prior proceeding. This time a different ALJ granted her benefits. This resulted in Y&O being held liable for benefits despite its

prior success before the Sixth Circuit and despite the fact that the prior proceedings had offered Respondent a full, fair and complete opportunity to prove her entitlement to benefits. The Sixth Circuit concluded that this was permissible.

In holding that these multiple bites at the apple were proper, the Sixth Circuit purported to rely on this Court's dictum concerning the proper interpretation of 33 U.S.C. § 922 in *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). Pet. App. 18a-19a. Because the decision of the Sixth Circuit extends *O'Keeffe* into territory that this Court could not have intended (ultimately nullifying any notion of finality as applied to black lung claims), and conflicts with the decisions of other circuit courts, this Court should grant the petition for certiorari.

A. The First Judgment

Petitioner was a coal mine employer of Respondent Milliken's husband. Respondent Milliken submitted her widow's application for benefits to be paid by Petitioner under the Black Lung Benefits Act, 30 U.S.C. §§ 901-45 (1994 & Supp. III 1997), to the District Director of the Office of Workers' Compensation Programs in August 1975. Pet. App. 2a. Petitioner objected to Respondent's claim, and the parties litigated the merits of Respondent's claim. An Administrative Law Judge denied benefits in 1986. Pet. App. 2a-3a. At the hearing before the Administrative Law Judge ("ALJ") in 1985, Respondent's counsel argued that the "widow's presumption" in favor of benefits under 20 C.F.R. § 727.204 applied. Respondent's post-hearing briefing also focused on the application of the § 727.204 presumption. In the January 1986 Order denying benefits, the ALJ found that "the evidence establishes that the miner's disability did not arise out of coal mine employment and that his death did not arise out of coal mine employment," a finding seemingly sufficient to rebut <u>any</u> presumption in favor of benefits, including the "widow's presumption."

Respondent appealed this denial to the Benefits Review Board ("BRB"), and on January 29, 1988, the BRB reversed the ALJ's 1986 order and granted benefits, *sua sponte* invoking a different presumption that Respondent had not raised before the ALJ.

Y&O Coal appealed this reversal to the Sixth Circuit. On January 23, 1989, in *Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989), the Sixth Circuit vacated the BRB's award of benefits, and reinstated the ALJ's denial of benefits. Pet. App. 5a. At no time before either the BRB or the merits briefing and argument before the Sixth Circuit did Respondent raise the applicability of the "widow's presumption." Pet. App. 6a.

On February 14, 1989, after the appropriate time for filing a petition for rehearing had passed, Respondent filed (1) a Motion for Stay of Mandate of January 23, 1989, (2) a Motion for an Enlargement of Time to file a Petition for Rehearing, and (3) Petition for Rehearing, this time expressly invoking the widow's presumption under § 727.204 before the Sixth Circuit. Pet. App. 6a. On March 15, 1989, the Sixth Circuit denied Respondent's motions. Pet. App. 7a.

Y&O, at that point, believed that it had prevailed in a proceeding that was complete, fair, thorough and long.

B. The Subsequent Administrative Proceedings

Nonetheless, one year later, Respondent's counsel sought to have the District Director re-review the Sixth Circuit's decision. She wrote to a Claims Examiner, asserting that "grounds [for modification pursuant to §725.310] will be more fully set forth in a modification request I am preparing to file shortly with the Deputy Commissioner." Despite the Director's initial conclusion that the time for seeking a modification of a prior order under either 33 U.S.C. § 922 or 20 C.F.R. § 725.310 had passed, Respondent persuaded the Director that the deadline for modification was March 15,

1990. Respondent's sole ground for "modification" was that the "widow's presumption" applied such that she was entitled to benefits. The Director denied Respondent's request, finding that Respondent had not established "that a mistake had been made in a determination of fact, or that there had been a change in condition." In addition, the Director expressed great reluctance "to modify the Court of Appeals decision."

Respondent appealed to an ALJ. On April 21, 1992, a second ALJ hearing was held. Pet. App. 68a. On April 15, 1993, the second ALJ entered an Order again denying benefits. Pet. App. 79a-80a. Respondent then appealed this denial to the BRB, and on June 21, 1995, the BRB affirmed the ALJ's 1993 Order in part, and vacated it in part, remanding to the ALJ for further proceedings. Pet. App. 58a, 66a. The BRB's Order concluded that modification is available even when the only error claimed is that "the applicable regulations have been mistakenly interpreted." Pet. App. 65a-66a.

The ALJ then awarded benefits to Respondent by invoking the "widow's presumption" pursuant to § 727.204. Pet. App. 56a-57a.

Petitioner appealed this reversal to the BRB. On September 30, 1998, the BRB affirmed the ALJ's 1997 Order. Pet. App. 46a.

C. The Decision Below

Petitioner petitioned the Sixth Circuit for review of the BRB's 1998 Order. A divided panel of the Sixth Circuit denied the petition and affirmed the BRB's Order. Pet. App. 1a-2a. The panel denied a petition for rehearing. Pet. App. 1a.

In holding that Y&O was liable to pay benefits notwithstanding the fact that it had previously prevailed, the

Sixth Circuit majority interpreted this Court's decision in *O'Keeffe* as establishing "very low standards" in allowing the agency to "modify" a prior order denying benefits. Pet. App. 18a-19a. Citing the exceedingly broad discretion to modify, the Sixth Circuit concluded that it was proper for Respondent to seek modification before the District Director after the Sixth Circuit's denial of benefits, relying only upon a mistake in the "ultimate fact" – specifically, that she was denied benefits when she should have been granted benefits. *Id.* In addition, the Sixth Circuit concluded that Respondent's failure to raise the "widow's presumption" in her first appeals before the BRB and the Sixth Circuit did not "abandon" the issues because "[t]his rule . . . is prudential and not jurisdictional." Pet. App. 21a.

Judge Wellford dissented. He described the basic holding of the majority: "after a multitude of questionable procedural moves and actions by the Board and the agency, the majority decides that administrative actions and decisions may effectually overrule this 1989 decision of [the Sixth Circuit]." Pet. App. 27a. Judge Wellford concluded that "[t]he Secretary, an ALJ, and the Board cannot overrule the determination of this Court." Pet. App. 28a.

REASONS FOR ISSUING THE WRIT

The Sixth Circuit has extended this Court's decision in *O'Keeffe* far beyond its intended reach, with the result that the Sixth Circuit has undermined the ability of a party defending against paying a black lung benefits claim to rely upon the initial adjudicative process or any decision adjudicating benefits. The integrity of adjudicative processes has no meaning when a party that has lost and appealed to a higher tribunal and lost can simply reassert her claim once again before the first tribunal, raising the same issues again. In light of the fact that the Sixth Circuit, in announcing this odd rule, relied upon a broad dictum in this Court's decision

in *O'Keeffe*, this Court should grant certiorari to clarify the limits on the rule it stated. Moreover, the Court should grant certiorari to resolve a conflict among the circuit courts on this issue. The Seventh, Tenth, and Eleventh Circuits have held (in agreement with Judge Wellford) that a District Director may not modify the decision of a superior adjudicative body such as an ALJ, the BRB, or the circuit court. The Sixth Circuit in this case and the Third Circuit have allowed a District Director or an ALJ to modify the decision of a superior adjudicative body.

I. THE SIXTH CIRCUIT HAS MISINTERPRETED THE COURT'S DECISION IN *O'KEEFFE*

The court below relied upon this Court's decision in *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), for its conclusion that 33 U.S.C. § 922 required the District Director to effectively reverse the prior judgment of the Sixth Circuit and allow benefits that had previously been, in his view, erroneously denied. Pet. App. 18a-19a. Under the Sixth Circuit's interpretation of *O'Keeffe* and § 922, a black lung claimant is entitled to relitigate any and all issues, hoping to find a more sympathetic finder of fact for his or her claim.[1] This stretches *O'Keeffe* far beyond its text – effectively eviscerating any concept of finality, and

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[1] The Sixth Circuit held that the "widow's presumption" had not been "decided" by the Sixth Circuit itself because the issue was only raised in Respondent's untimely Petition for Rehearing. Pet. App. 12a. The court glossed over the fact that Respondent had raised the presumption in the agency, before the first ALJ, but then abandoned it on subsequent appeals, including the merits briefing before the Sixth Circuit. Pet. App. 20a-21a. Allowing a party to raise the issue again later guarantees piecemeal appeals. Moreover, "arguments not raised in the proponent's opening brief on appeal are generally considered abandoned." Pet. App. 21a (*citing Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir. 1998)).

permitting piecemeal litigation in administrative and judicial adjudication of black lung benefits.

Section 922 was intended to provide a measure of *discretion* to a "deputy commissioner" so that he could correct mistakes or account for changed conditions within one year after a claim was decided. Section 922 allows the "deputy commissioner" within "one year after the rejection of a claim" to "review a compensation case" and modify the existing compensation order. 33 U.S.C. § 922. The statute provides that a compensation order may only be modified if there has been "a change in conditions" or "a mistake in determination of fact." *Id.*

In *O'Keeffe*, the Court held that § 922 vested a deputy commissioner with "broad discretion" to revisit an initial denial of compensation within a year after the denial "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflecting on the evidence submitted." 404 U.S. at 256. The facts in *O'Keeffe* were such that the deputy commissioner revisited the claim at issue within one year after he denied the claim, and then awarded benefits after receiving some additional evidence. *Id.* at 254. Neither the employer nor the claimant had gone through any appellate proceedings before an ALJ, the BRB, or the court of appeals prior to the modification. In the truest sense, the deputy commissioner had exercised his discretion to reconsider and change his mind.

The notion that a person charged with decision-making authority can elect to entertain additional evidence or argument presents no novel jurisprudential rule. Trial judges, for example, often entertain motions to reconsider and do so as a matter of the exercise of their sound discretion. *See* Fed. R. Civ. P. 50(b), 52(b).

In this case, however, the Sixth Circuit was not simply faced with a situation, as in *O'Keeffe*, in which the District Director (the current name for the "deputy commissioner" referred to in § 922) decided to hear new evidence and argument and changed his mind within one year after his initial decision. Rather, this claim had already been the subject of litigation for fourteen years at the time the District Director considered and *rejected* Respondent's modification request pursuant to § 922. The parties had proceeded through the following steps prior to Respondent's request for modification:

- The District Director issued a Notice of Initial Finding on June 3, 1980.
- The ALJ denied the claim on January 16, 1986.
- The Benefits Review Board reversed, awarding Respondent benefits on January 29, 1988.
- The Sixth Circuit reversed the Benefits Review Board's Order and reinstated the ALJ's Order on January 23, 1989.
- Respondent had failed to timely file a petition for rehearing before the Sixth Circuit but filed an untimely motion for enlargement of time to file her petition for rehearing, as well as a petition for rehearing, on February 14, 1989.
- The Sixth Circuit denied Respondent's motion and petition on March 15, 1989.

Only after proceeding through each of these steps did Respondent seek to invoke § 922 and to do so on the basis of an argument that she had raised in the prior proceedings.

Indeed, throughout the subsequent proceedings relating to Respondent's modification request, the only ground Respondent raised in favor of modification was that the "widow's presumption" applied such that she was entitled to

benefits. Pet. App. 8a-9a; *see* 30 U.S.C. § 921(c)(5) (1994); 20 C.F.R. § 727.204. As the court below noted, Respondent raised this same ground during the first proceeding before the ALJ. Pet. App. 6a. While the ALJ did not specifically address the applicability of widow's presumption, the ALJ made findings of fact sufficient to rebut any presumption, including the widow's presumption. Respondent did not raise the presumption in any of the later proceedings before either the Benefits Review Board or the Sixth Circuit. Pet. App. 6a. Only after her claim was denied by the Sixth Circuit did Respondent seek to raise the widow's presumption in her untimely petition for rehearing and the subsequent modification proceedings before the ALJ. *Id.*

The court below concluded that it was perfectly proper for Respondent to wait until her claim had proceeded through the appellate process and then, after the claim was denied by the Sixth Circuit, raise an issue that Respondent had raised initially before the ALJ but not in any subsequent motion for reconsideration or appeal until after the Sixth Circuit denied her claim. Pet. App. 20a-21a. Respondent then relitigated the application of the widow's presumption through another set of adjudicatory hearings and appellate reviews. Pet. App. 8a-9a. Finally, Respondent prevailed.[2]

In affirming the BRB's grant of benefits, the Sixth Circuit relied upon the Court's decision in *O'Keeffe* as authority for the proposition that Respondent was entitled to raise the widow's presumption to initiate an entirely new set of proceedings, even after her claim had proceeded through every stage of appellate review possible, except for seeking review by this Court, and even after Respondent had

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[2] Importantly, neither the District Director nor the second ALJ initially found that Respondent had established grounds to warrant modification. Pet. App. 72a-73a, 79a-80a.

abandoned this ground in prior appellate proceedings. Pet. App. 18a-19a.

O'Keeffe, however, merely holds that a District Director has "broad discretion" to modify his own decision within one year. 404 U.S. at 256. The "discretion" to which the Court referred, could *not* allow the District Director to review a decision on a claim *rejected* by an ALJ, the BRB, or a circuit court. Indeed, such a result would fly in the face of the longstanding principles of claim preclusion, policies against piecemeal adjudication, and the authority of a superior adjudicative body's decision over an inferior adjudicative body. Absent some change of circumstance that renders the new claim somehow different, the District Director does not have the "discretion" to indefinitely revise a final decision that has proceeded through the full range of review, including the final judgment of the reviewing court. *See generally Pittston Coal Group v. Sebben*, 488 U.S. 105, 122 (1988) (finding that a statute ought not to be interpreted "to override the principle of res judicata not just once but perpetually, requiring readjudication and re-readjudication (despite the normal rules of finality) until the Secretary finally gets it right").

Moreover, the Court of Appeals' effort to invoke "discretion" is entirely misplaced. The result of the Sixth Circuit's decision is simply that a claimant who believes that her claim was improperly denied is free to press her claim again, raising whatever ground she wishes to, whether it was raised previously or not. The second time around, she may simply find a more hospitable or perhaps (in her view) wiser decision-maker in the agency, the ALJ, the BRB, or the circuit court. Nothing in the decision of the court below limits a claimant's ability to get multiple bites at the apple.

Rather, she can try to get benefits forever.[3] The Benefits Review Board held, in absolute terms, that "once a request for modification has been filed, regardless of the grounds stated if any, the district director must consider all the evidence for any mistake of fact or change in conditions." Pet. App. 64a. If the Benefits Review Board thinks benefits should be awarded, it will grant them, notwithstanding that a differently constituted Review Board, or the Sixth Circuit, or some other court of appeals, had previously held that benefits were not appropriate.

The holding of the Sixth Circuit creates a right to a second bite at the apple. Indeed, in light of that ruling, it is difficult to see why any claimant would not seek to keep its claim alive by filing serial requests.[4] The Sixth Circuit's decision will necessarily result in repetitive requests, thus subjecting coal mine employers and claimants to needless costs and burdens, and depriving them of the assurance of finality of decision and repose that have always been considered fundamental to any justice system. Moreover, as the Sixth

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[3] The Sixth Circuit made light of the argument that rule it established would cause continuous, repetitive litigation by both claimant and employer. This concern, however, is a very real one, as the facts here show. For a period of time before the Sixth Circuit's 1989 decision, Respondent was paid benefits. After the Sixth Circuit's 1989 decision reinstating the ALJ's denial of benefits, the District Director sought to have those benefits repaid. Pet App. 7a. That prompted Respondent to file a request for modification. If she were to have lost that, she would have incentive to file another to postpone having to repay benefits.

[4] In addition, employers will also be able to and likely would file serial requests, as § 922 permits the coal mine employer to seek modification of a claim "at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued." 33 U.S.C. § 922. Thus, as long as an employer is paying benefits because of a compensation order (or before an order has issued, or within a year after payments stop), it could seek modification of the decision.

Circuit majority conceded, such requests could only make worse an already untenable, perhaps unconscionable, situation: The "snail-like pace of black lung benefits cases" will not be helped by an influx of repetitive requests. Pet. App. 22a.

The Sixth Circuit's response that this Court's decision in *O'Keeffe* created this problem, and that if the result is untenable, "the coal mining employers' recourse is with the 'authorities who can do something about it,'" Pet. App. 23a, is not a solution at all. The Sixth Circuit's misreading of the broad language in *O'Keeffe* is the basis for this decision. Thus, the Court should grant the writ in order to clarify that its dictum in *O'Keeffe* does not authorize this result.

II. THE CIRCUIT COURTS OF APPEAL ARE IN CONFLICT AS TO WHETHER A DISTRICT DIRECTOR OR AN ALJ MAY MODIFY THE DECISION OF A SUPERIOR ADJUDICATIVE BODY

While the Sixth Circuit pays lip service to the principle that inferior adjudicating bodies may not alter the decision of a reviewing authority, its decision allows precisely that. Other circuits, however, have held firmly to that principle and have rejected attempts by District Directors or ALJs under § 922 to modify the decisions of superior adjudicative bodies.

In interpreting § 922, a number of courts of appeals have held that § 922 allows a deputy commissioner, or District Director, or ALJ, to modify his own decision but does not permit him to modify the decision of an adjudicative body at a different level. *See Director, Office of Workers' Compensation Programs v. Kaiser Steel Corp.*, 860 F.2d 377, 379 (10th Cir. 1988) (director "is without statutory authority . . . to propose modification for any mistaken determination of fact other than his own"); *Director, Office of Workers' Compensation Programs v. Peabody Coal Co.*, 837 F.2d 295,

299 (7th Cir. 1988) ("it seems quite logical for Congress to assume that the error would be corrected by the official who made it or by higher authority – not by the deputy commissioner"); *Director, Office of Workers' Compensation Programs v. Drummond Coal Co.*, 831 F.2d 240, 245 (11th Cir. 1987) (director "may only correct his own prior factual errors, not those of any superior adjudicative authorities involved in the agency's determination of a benefits claim").[5]

The Court should therefore resolve the conflict in the circuits on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[5] The Third Circuit has, however, allowed an ALJ to modify a decision, even when it had been affirmed by the BRB. *See Keating v. Director, Office of Workers' Compensation Programs*, 71 F.3d 1118, 1123 (3rd Cir. 1995).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 98-4395
No. 97-1519 BLA

THE YOUGHIOGHENY AND OHIO COAL COMPANY,
Petitioner,

v.

EVELYN MILLIKEN, Widow of HAROLD MILLIKEN, and
Director, Office of Workers' Compensation Programs,
United States Department of Labor,
Respondents.

On Petition for Review of a Decision
and Order of the Benefits Review Board,
United States Department of Labor.

Argued: October 29, 1999
Decided and Filed: December 29, 1999
Rehearing and Suggestion for Rehearing En Banc
Denied March 2, 2000*

Before: WELLFORD, MOORE, and GILMAN, Circuit Judges.

GILMAN, J., delivered the opinion of the court, in which MOORE, J., joined. WELLFORD, J., delivered a separate dissenting opinion.

OPINION

RONALD LEE GILMAN, Circuit Judge. This is a black lung benefits case that began nearly twenty-five years ago with the

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* Judge Wellford would grant rehearing for the reasons stated in his dissent.

death of a coal-mining employee named Harold Milliken. Since then, the case has involved three formal hearings before an administrative law judge (ALJ), three appeals to the Benefits Review Board, and two petitions to this court for judicial review. On its third trip through the adminstrative process, the ALJ concluded that Evelyn Milliken was entitled to survivor's benefits, and the Benefits Review Board affirmed. Harold Milliken's former employer, the Youghiogheny and Ohio Coal Company (Y & O), has petitioned this court for judicial review. For the reasons set forth below, we conclude that the Board's affirmance was not legally erroneous and that the ALJ's decision was supported by substantial evidence. We therefore DENY Y & O's petition for review.

I. BACKGROUND

Harold Milliken worked in the coal mines for approximately forty years. He ceased working in the mines in 1973 due to health problems, and he died two years later. Evelyn Milliken, Harold Milliken's widow, filed a claim in August of 1975 for surviving spouse benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945.

The ALJ to whom the claim was assigned concluded in 1986 that Milliken's autopsy evidence was sufficient to trigger the so-called "Part C" interim presumption of 20 C.F.R. §727.203(a)(1). Under that interim presumption, a miner engaged in coal mine employment for at least ten years is entitled to a rebuttable presumption that he was totally disabled from, and died due to, pneumoconiosis arising from his coal mine employment if a chest X-ray, biopsy, or autopsy establishes the existence of pneumoconiosis. *See id.* Coal workers' pneumoconiosis is a pulmonary disease that in its "complicated" form "involves progressive massive fibrosis as a complex reaction to dust and other factors (which may include tuberculosis or other infection), and usually produces significant pulmonary impairment and marked respiratory

disability." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976) (footnote omitted). "This disability limits the victim's physical capabilities, may induce death by cardiac failure, and may contribute to other causes of death." *Id.* (footnote omitted). For the purposes of federal black lung benefits law, however, "pneumoconiosis" is a term of art that means any "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment," and encompasses a number of coal dust-related pulmonary diseases in addition to coal workers' pneumoconiosis. *See* 20 C.F.R. § 727.202.

Harold Milliken's autopsy results disclosed, among other ailments, anthracosis (which is included in the § 727.202 definition of pneumoconiosis) and fibrosis. Evelyn Milliken, the ALJ concluded, was thus entitled to the interim presumption under 20 C.F.R. § 727.203(a)(1). This interim presumption, however, can be rebutted by evidence that the miner's death "did not arise in whole or in part out of coal mine employment." 20 C.F.R. § 727.203(b)(3). The ALJ, in a decision and order dated January 16, 1986, concluded that the interim presumption in this case was so rebutted. This determination was based on the opinion of physicians who had reviewed pertinent medical records and concluded that Harold Milliken was not disabled due to coal dust exposure when he died, and that his death was not in any way affected by coal dust exposure because his level of pneumoconiosis at the time he died could not have caused any disability or impairment. The primary cause of death listed on Harold Milliken's death certificate, in fact, was heart disease, although pneumoconiosis was listed as a contributing factor.

Evelyn Milliken then filed a pro se appeal. A divided Benefits Review Board reversed, awarding her benefits. The Board considered itself bound by this court's decision in *Kyle v. Director, OWCP*, 819 F.2d 139 (6th Cir. 1987), to adjudicate her claim under the regulations ordinarily

applicable to "Part B" claims, which are set forth at 20 C.F.R. Part 410. Generally, "Part B" claims are those that were filed before July 1, 1973 and processed by the Social Security Administration pursuant to regulations promulgated by the Secretary of Health and Human Services (formerly Health, Education and Welfare). The benefits for "Part B" claims are funded by the government. "Part C" claims, in contrast, are those filed on or after July 1, 1973, and processed by the Office of Workers' Compensation Programs pursuant to regulations promulgated by the Secretary of Labor. The benefits for "Part C" claims are employer-funded.

The regulations pertinent to "Part B" claims provide for an "interim presumption" that a miner who died before January 1, 1974 was, at the time of his death, totally disabled from, and died due to pneumoconiosis if a chest X-ray, biopsy, or autopsy establishes the existence of pneumoconiosis. *See* 20 C.F.R. § 410.490(b)(1). This "Part B" interim presumption is similar to the "Part C" interim presumption established by Labor Department regulation at 20 C.F.R. § 727.203, although the "Part B" interim presumption does not have a rebuttal provision similar to the one that applies to the interim presumption in "Part C" claims. *Compare* 20 C.F.R § 727.203(b) *with* 20 C.F.R. § 410.490(c). Instead, the regulations provide that the "Part B" interim presumption can be rebutted only upon a showing that the miner is "doing his usual coal mine work or comparable and gainful work," 20 C.F.R. § 410.490(c)(1), or that the miner is able to do such work, *see* 20 C.F.R. § 410.490(c)(2). Another significant difference between the "Part B" and "Part C" interim presumptions is that the "Part C" regulations require at least ten years of coal mining employment before the interim presumption can be invoked. *See* 20 C.F.R. § 727.203(a)(1). The "Part B" regulations, however, do not impose the ten-year requirement for the presumption to be invoked if a chest

X-ray, biopsy, or autopsy establishes the existence of pneumoconiosis. *See* 20 C.F.R. § 410.490(b)(1)(i).

Because Harold Milliken died after January 1, 1974, one might ordinarily presume that the regulations pertinent to "Part B" claims have nothing to do with this case. But the statute authorizing the Secretary of Labor to promulgate regulations for "Part C" claims, 30 U.S.C. § 902(f), requires that the criteria for entitlement to black lung benefits adopted by the Secretary be "not . . . more restrictive than the criteria applicable to a claim filed on June 30, 1973," when the "Part B" regulations adopted by the Secretary of Health, Education and Welfare were in effect.

In *Kyle*, this court held that a coal miner who had worked in the coal mines for less than ten years, but who had a positive x-ray reading for pneumoconiosis that would have entitled him to the interim presumption under the "Part B" regulations but not the "Part C" regulations, should have had his claim considered under the "Part B" regulations. *See Kyle*, 819 F.2d at 144. This was because the Labor Department regulations' criteria, which included a requirement of ten years of coal mine work before the "Part C" interim presumption could be applied, were "more restrictive" than the Health, Education and Welfare Department regulations' criteria that imposed no such requirement for the interim presumption applicable to "Part B" claims. The Labor Department regulations thus exceeded the Secretary of Labor's rulemaking authority under 30 U.S.C. § 902(f). *See id.*

Following the Board's reversal of the ALJ and its award of benefits to Evelyn Milliken, Y & 0 petitioned this court for review. The petition was granted, the Board was reversed, and the ALJ's order denying benefits was reinstated in an opinion filed on January 23, 1989. *See Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195, 203 (6th Cir. 1989). In so ruling, this court held that its prior decision in *Kyle* was

limited to holding that the criteria for initially invoking the "Part C" interim presumption had to be "not . . . more restrictive" than the criteria for invoking the "Part B" interim presumption, but that *Kyle* did not apply to the methods of rebutting the interim presumption. *See id.* at 202. (The Supreme Court, in *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991), subsequently held, in apparent agreement with this court's 1989 opinion in this case, that the Labor Department regulations were not inconsistent with 30 U.S.C. § 902(f)(2) to the extent that they allowed the interim presumption to be rebutted with evidence demonstrating that the miner does not or did not have pneumoconiosis or that the miner's disability does not or did not arise out of coal mine employment. *See id.* at 706.)

On February 14, 1989, Evelyn Milliken filed a petition for rehearing, a motion for enlargement of time to file her petition for rehearing (because the time for filing a petition for rehearing had already elapsed), and a motion for a stay of this court's mandate, arguing that she was entitled to an award of benefits under an altogether different presumption, the so-called "widow's presumption." This was an argument that she had raised before the ALJ, although the ALJ never addressed it. But she had not made this argument before either the Board or this court prior to filing her post-judgment motions. For this reason, neither the Board nor this court considered the applicability of the widow's presumption.

Under the widow's presumption, eligible survivors are presumptively entitled to benefits if their spouses were miners who died on or before March 1, 1978, having been employed for 25 years or more in one or more coal mines before June 30, 1971. *See* 30 U.S.C. § 921(c)(5); 20 C.F.R. § 727.204 (implementing regulation). (Unlike the regulations that accompany the interim presumptions, which clarify how those presumptions are raised and rebutted, the regulation that implements the widow's presumption simply reiterates the

text of § 921(c)(5), except for the statutory section's "sunset" provision.)

The widow's presumption, as construed by this court, can be rebutted in a particular case by a showing that the miner in question was not "partially or totally disabled due to pneumoconiosis" at the time of his death. *See Begley v. Consolidation Coal Co.*, 826 F.2d 1512, 1517 (6th Cir. 1987) (setting forth the test for rebutting the widow's presumption). This court denied Evelyn Milliken's motions for an extension of time within which to petition for rehearing and for a stay of the court's mandate in a one-sentence order dated March 15, 1989. The mandate issued on March 23, 1989. She did not seek review by the Supreme Court.

The Department of Labor subsequently requested reimbursement for benefits already paid to Evelyn Milliken. On February 5, 1990, her attorney sent a letter to the Department of Labor on her behalf, stating that she had been "advised" (presumably by her attorney) "to consider requesting a modification under 20 C.F.R. [§] 725.310 on grounds of mistake in both the original adjudication and the appeals thereof." The letter explained that "[t]hese grounds will be more fully set forth in a modification request I am preparing to file shortly" with the district director of the Office of Workers' Compensation Programs, the appropriate Department of Labor official.

Although the district director deemed this letter a valid modification request, he rejected the request as untimely because more than one year had elapsed between this court's judgment reinstating the ALJ's 1986 order and the date her February 5, 1990 letter was received. Evelyn Milliken objected in a letter dated March 9, 1990, in which she argued that her one-year period to seek modification began to run no sooner than March 15, 1989, the date this court denied her motions for enlargement of time and for a stay of its mandate. The district director then changed course, recommending that

the request for modification be deemed timely, but that it be denied on the merits.

A hearing was eventually held before another ALJ (not the one who denied benefits in 1986), who, in a decision and order dated April 15, 1993, concluded that the request for modification was timely and that this court's 1989 order reinstating the ALJ's original decision to deny benefits did not preclude modification. The second ALJ, however, agreed with the district director that the request for modification should be denied on the merits, concluding that a petition for modification pursuant to 20 C.F.R. § 725.310 simply did not provide a remedy for the problem Evelyn Milliken was complaining about—an allegedly erroneous decision not to apply the widow's presumption.

Evelyn Milliken appealed the ALJ's decision to the Board. Y & 0 cross-appealed, arguing that the request for modification should have been denied as untimely, and also should have been denied because the ALJ lacked the power to modify a decision that a higher authority (this court) had ordered reinstated. The Board affirmed in part, vacated in part, and remanded the case to the ALJ, concluding that (1) the petition for modification was timely filed, (2) modification was not precluded, even though this court had directed the reinstatement of the ALJ's prior order, and (3) Evelyn Milliken's request was an appropriate subject for modification proceedings and should have been considered on the merits by the ALJ.

On remand, the ALJ, in a decision and order issued on July 16, 1997, awarded benefits. The ALJ held that Evelyn Milliken was entitled to the widow's presumption because Harold Milliken had worked in the coal mines for more than twenty-five years before June 30, 1971, and because he died before March 1, 1978. Y & 0, the ALJ concluded, had failed to rebut the presumption by showing that Harold Milliken was not "partially or totally disabled due to pneumoconiosis"

when he died. *See* 30 U.S.C. § 921(c)(5). Following this decision, Y & 0 appealed to the Board, which affirmed the award of benefits in an opinion and order dated September 30, 1998. Y & O's petition for review by this court followed.

In its petition, Y & O argues that (a) this court's order denying rehearing of its January 23, 1989 judgment stripped both the ALJ and the Board of jurisdiction to consider as grounds for modifying the ALJ's order the widow's presumption argument that Evelyn Milliken sought unsuccessfully to advance in her petition for rehearing, (b) the document deemed by the ALJ and the Board to constitute a timely modification request was not timely filed, (c) the document was, in any event, not a proper request for modification, (d) that Evelyn Milliken forfeited any right she had to the application of the widow's presumption by not specifically objecting to the ALJ's failure to consider it when she initially appealed to the Board and when she did not raise the issue in her briefs before this court during Y & O's prior petition, (e) the ALJ "just re-weighed the evidence anew" and thus exceeded his authority under the regulation that permits modification of prior ALJ orders, and (f) modification was also inappropriate because the ALJ in 1986 made proper findings of fact that would have foreclosed Evelyn Milliken from any entitlement to benefits, including the widow's presumption, thus rendering his failure to consider the applicability of the widow's presumption harmless error.

II. ANALYSIS

A. Effect of this court's denial of rehearing

Evelyn Milliken argued during her first hearing before the ALJ in 1986 that she was entitled to the widow's presumption, although the ALJ's decision and order did not discuss this argument. On appeal to the Board, and in defending the Board's decision before this court, she did not argue that the ALJ erroneously failed to consider her entitlement to that

presumption. She did, however, make the argument in her untimely and unsuccessful petition for rehearing before this court. Y & O now argues that because she raised this argument before this court (albeit only in an unsuccessful attempt to gain rehearing), that neither the ALJ nor the Board had the authority to reconsider the argument. Essentially, Y&O argues that allowing the ALJ or the Board to consider an argument that this court rejected--regardless of why this court rejected it—would allow a "lower adjudicatory tribunal" to undo the judgment of a "higher adjudicating tribunal." Y&O argues that Evelyn Milliken's request for modification, after being submitted to the Department of Labor's district director, should then have been directed to this court to see "if modification of its denial of the Petition for Rehearing was still appropriate."

For the unremarkable proposition that inferior tribunals cannot refuse to obey the decisions of superior tribunals, Y&O relies on *Director, OWCP v. Kaiser Steel Corp.*, 860 F.2d 377 (10th Cir. 1988); *Director, OWCP v. Peabody Coal Co.*, 837 F.2d 295 (7th Cir. 1988); *Director, OWCP v. Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987). In each of those cases, however, a district director of the Office of Workers' Compensation Programs attempted to "modify" the award of an ALJ, who outranks the district director in the administrative hierarchy. The authorizing statute permits district directors to modify awards based on a "mistake in a determination of fact" only when the mistake was made by the district director himself. *See, e.g.*, 33 U.S.C. § 922. If the alleged mistake was made by the ALJ, the district director lacks the authority to correct it, even though the statute and regulations require that the request for modification be addressed to the district director and then forwarded to the Office of Administrative Law Judges for adjudication. *See, e.g., Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 390 (6th Cir. 1998).

Administrative agencies and ALJs, of course, are not free to ignore this court's mandates. This "mandate rule" is sometimes described as part of the inaptly-named "law of the case doctrine." *See, e.g.*, 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478, at 788-93 (1st ed. 1981 & Supp. 1999). *See also Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998) (noting that the doctrine applies to judicial review of administrative decisions and that the doctrine requires the administrative agency "to conform its further proceedings in the case to the principles set forth in the judicial decision, unless there is a compelling reason to depart").

An appellate court's mandate, however, forecloses a lower court or an agency only from revisiting issues that the appellate court actually decided. *See, e.g., Biggins v. Hazen Paper Co.*, 111 F.3d 205, 209 & n.3 (1st Cir. 1997) ("Broadly speaking, mandates require respect for what the higher court decided, not for what it did not decide."). *See also, e.g., Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) ("[A]lthough the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it leaves to the [lower] court any issue not expressly or impliedly disposed of on appeal.") (internal quotation marks and citation omitted).

Moreover, Y & O's argument presumes that the courts of appeals exercise the same degree of supervision and control over administrative agencies as they maintain over the district courts within their jurisdiction, which they do not. *See, e.g., FCC v. Pottsville Broadcasting Corp.*, 309 U.S. 134, 145 (1940) ("[A]n administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge."); *Communication Workers of America, Local 5008 v. NLRB*, 784 F.2d 847, 849 (7th Cir.

1986) ("Judicial review of [an agency's] orders permits correction of legal mistakes, [but] once any mistake has been exposed further proceedings are in the [agency's] charge," and also describing as "unthinkable" the idea that the law-of-the-case doctrine would bar on remand an administrative agency's use of an agency policy, the legal basis of which was not raised before, or addressed by, the court of appeals).

Because it was not timely filed, this court never disposed of Evelyn Milliken's petition for rehearing on the merits, either expressly or impliedly. In 1989, the time to file a petition for rehearing in any type of case was fourteen days from the entry of judgment, unless altered by court order or local rule. See Fed. R. App. P. 40 (1989). This court's judgment was entered on January 23, 1989. Milliken's petition for rehearing and motion for an extension of time within which to file her petition were filed on February 14, 1989, more than fourteen days later, and were thus untimely. The order entered by this court on March 15, 1989 in fact denied Evelyn Milliken's motion for an extension of time in which to file a petition for rehearing and denied her motion for a stay of this court's mandate, but did not address the merits of her petition. It thus appears that this court did not deny her petition for rehearing, but rather denied her permission to file the petition. In sum, this court's prior opinion did not foreclose the subsequent ALJ from modifying the 1986 ALJ's order in accordance with a statutory provision that neither the ALJ in 1986 nor this court in 1989 considered. The ALJ thus had jurisdiction to entertain the request for modification on the merits.

B. Timeliness of the request

Y & O argues that Evelyn Milliken's request for modification of the ALJ's order was untimely in any event, because it was not filed within one year from January 23, 1989, the date this court issued its prior opinion and order in this case. The document that the ALJ considered to be the request for modification was submitted to the district director

on February 5, 1990. This court, however, denied Evelyn Milliken's motion to file her untimely petition for rehearing and motion to stay the mandate on March 15, 1989, and its mandate actually issued on March 23, 1989. Both of those dates are less than one year before February 5, 1990.

Under the governing statute, requests for modification may be filed "at any time prior to one year after the rejection of a claim . . . ." 33 U.S.C. § 922. *See also* 20 C.F.R. § 725.310(a) (requiring that a claimaint's request for modification be filed "at any time before one year after the denial of a claim . . . ."). Consistent with the authorizing statute and regulations, the Director of the Office of Workers' Compensation Programs considers claims rejected or denied when they become "final." *See* 33 U.S.C. § 921(a). The statute and regulations define when an order of the ALJ or the Board becomes "final." Neither the statute nor the regulations, however, elucidates when a court of appeals's decision to reinstate an ALJ's order denying benefits becomes "final" for the purpose of starting the one-year period to file a request for modification.

As the Ninth Circuit has recently observed, the terms "'final,' 'judgment,' and 'not appealable,' all have clearer meanings when applied to district courts than to courts of appeals." *Bianchi v. Ross*, 154 F.3d 1023, 1024 (9th Cir. 1998). Unlike district courts, the courts of appeals direct the district courts and administrative agencies over which they have appellate or reviewing jurisdiction through mandates, not through orders and judgments. *See, e.g., Shakespeare Co. v. Silstar Corp. of America, Inc.*, 906 F. Supp. 997, 1002 (D.S.C. 1995) (noting that the mandate is the "official mode of communicating the judgment of an appellate court to a lower court, thereby directing action to be taken or disposition to be made of the cause by the trial court") (citation and brackets omitted), *aff'd* 110 F.3d 234 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 688 (1998). This is true even though in

most cases the mandate simply consists of a certified copy of the judgment of the court of appeals, a copy of the court's opinion, and any directions regarding the taxation of costs. *See* Fed. R. App. P. 41.

Although the issuance of the mandate is largely a formality, the court of appeals retains jurisdiction over the case until it issues, and the district court or agency whose order is being reviewed cannot proceed in the interim. *See, e.g.*, 16A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3987, at 735-36 (3d ed. 1999); *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 897-98 (5th Cir. 1995) (collecting cases). In fact, even when a case is destined for remand, the case file physically remains in the office of the clerk of the court of appeals until the mandate issues.

Under the current version of Rule 41(a) of the Federal Rules of Appellate Procedure, the mandate must issue seven days after the time for filing a petition for rehearing expires, unless the court has directed otherwise. In 1989, Rule 41(a) provided that the mandate was to issue twenty-one days after the entry of judgment, unless the court ordered otherwise. *See* Fed. R. App. P. 41(a) (1989). Under both versions of the rule, a timely petition for rehearing would automatically stay the mandate unless the court ordered otherwise.

To hold that the one-year time limit to request modification from the district director begins to run even before the mandate issues would be inconsistent with the time frame set forth in 33 U.S.C. § 922. That section provides that review by the district director (and subsequent action by other appropriate officials) may be had "at any time prior to one year after the rejection of a claim." The words "at any time" suggest that Congress intended to give aggrieved parties (or district directors, who may initiate the modification process on their own), a full year in which modification can be sought. It would make little sense to conclude that a

significant part of that year expires during the pre-mandate period, during which the district director lacks jurisdiction to act on the request and does not even have physical custody of the case file. In fact, because Rule 40(a) now grants all parties to a civil case in which the United States or a federal agency or officer is a party forty-five days from the entry of judgment to petition for rehearing, and because a federal agency or officer will invariably be a party to any black lung benefits case, *see* 30 U.S.C. § 932(k), nearly two months will typically elapse between the entry of judgment and the issuance of the mandate in black lung benefits cases. During the first forty-five days of that time, of course, a party may file a petition for rehearing and the court of appeals may agree to rehear the case.

In this case, the mandate issued on March 23, 1989, less than a year before the date on which the district director determined that Evelyn Milliken requested modification. The reason that the mandate issued more than twenty-one days after the entry of judgment was because the court was considering Milliken's motion to extend the time within which to file her petition to rehear, which was ultimately rejected. Indeed, the court requested that Y & O respond to the petition for rehearing. (Rule 40 did not then, and does not now, permit responses to petitions for rehearing unless requested by the court.) But even if the mandate had issued on February 13, 1989, twenty-one days after this court's judgment was entered, the request for modification, deemed submitted on February 5, 1990, would have been timely.

Y & O argues that unless the one-year period within which to request modification from the district director begins on the date the court of appeals enters judgment, claimants would be able to extend their time to request modification indefinitely by repeatedly filing motions for rehearing in order to delay the court of appeals from issuing its mandate. We find this argument unpersuasive. First, it seems highly unlikely that a

claimaint's attorney would file serial petitions for rehearing by this court (which would almost surely be summarily denied if the first such petition was denied) in order to preserve the means to file a modification request with the district director, rather than simply file the modification request itself. Second, it is exceedingly difficult to imagine that any court of appeals would allow its procedures to be abused in that way. Consistent with Rules 40 and 41, a court of appeals could put an end to such serial petitions by summarily denying a second petition for rehearing and simultaneously ordering that the mandate issue forthwith.

A more plausible argument, also raised by Y & O, is that by statute and Supreme Court rule, the time to file a petition for certiorari runs from the date that the court of appeals enters its judgment, not from the date of its mandate. *See* 28 U.S.C. § 2101(c); Sup. Ct. R. 13(l). Unlike a district court or an administrative agency, however, the Supreme Court of the United States does not need to wait for a court of appeals to issue its mandate before it can act in a case. The Supreme Court, in fact, can agree to hear a case even before the court of appeals enters judgment. *See* 28 U.S.C. § 2101 (e). We therefore do not find the commencement date for the filing of a petition for certiorari persuasive in determining when a court of appeals's decision becomes "final" for the purpose of starting the one-year period to file a request for modification.

After taking all factors into consideration, we hold that the time to file a request for modification with the district director begins when the mandate of the court of appeals issues, at which time the Office of Workers' Compensation Programs regains jurisdiction to entertain such a request.

C. Sufficiency of the request for modification

Next, Y & O argues that the February 5, 1990 letter from Evelyn Milliken's attorney to the district director, which stated that Evelyn Milliken "was advised to consider requesting a modification under 20 C.F.R. [§] 725.310 on

grounds of mistake in both the original adjudication and the appeals thereof," and that the grounds for the request "will be more fully set forth in a modification request I am preparing to file shortly," was not a proper request for modification. Y & O contends with some force that one would ordinarily expect that a document deemed a request for modification would in fact request the modification, and not simply manifest an intent to file such a request in the future.

In black lung cases, however, the standard for what constitutes a modification request is very low. *See, e.g., Betty B Coal Co. v. Director, OWCP*, —F.3d—, 1999 WL 960763, at *5 (4th Cir. Oct. 21, 1999) ("Almost any sort of correspondence from the claimant can constitute a request for modification of a denial, as long as it is timely and expresses dissatisfaction with a purportedly erroneous denial"). *Compare also Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545, 547 (5th Cir. 1974) (holding that a district director's written summary of a telephone message from a claimant's attorney that "the claimant is permanently totally disabled and will file for review under [33 U.S.C. § 922]" constituted an application for modification under 33 U.S.C. § 922) (internal quotation marks omitted) *with I.T.O. Corp. of Virginia v. Pettus*, 73 F.3d 523, 527 (4th Cir. 1996) (noting that the critical factor is the district director's ability to discern that modification of a particular order is desired, while rejecting the argument that an unexplained statement that "we herewith make claim for any and all benefits my client may be entitled to" suffices to alert the district director that modification of a prior order is being sought).

Y & O also argues that a letter from Evelyn Milliken's attorney to the district director dated March 28, 1990 makes clear that the February 5, 1990 letter was not a request for modification. This argument is premised on the assumption that modification under 20 C.F.R. § 725.310 is not appropriate for "complain[ts] about legal issues." Y & O therefore reasons that because the grounds for modification

under 20 C.F.R. § 725.310 are "a change in conditions" or "a mistake in a determination of fact," the March 28, 1990 letter expressly disclaims her entitlement to the only legitimate bases for modification because it states that the reconsideration request "neither re-argues previously litigated facts" nor "proffer[s] any newly discovered evidence."

We do not believe, however, that the distinction between "law" and "facts" is as clear as Y & O suggests, at least not in black lung benefits cases or cases arising under the Longshore and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901-950. (The Longshore Act's judicial review and administrative modification provisions are specifically incorporated into the Black Lung Benefits Act. *See* 30 U.S.C. § 932(a).) Indeed, at least one court of appeals has referred to a black lung claimant's entitlement to benefits as "the ultimate fact." *Keating v. Director, OWCP*, 71 F.3d 1118, 1122-23 (3d Cir. 1995). *See also Betty B Coal Co.*, 1999 WL 960763, at *5 ("[A]ny mistake of fact may be corrected, including the ultimate issue of benefits eligibility"). *Compare Amax Coal Co. v. Franklin*, 957 F.2d 355, 357-58 (7th Cir. 1992) (noting that the question of whether a miner had black lung disease is not one of "fact[] in the lay sense," but observing that the question is nevertheless treated as one of fact for the purposes of deciding whether a "mistake in a determination of fact" has been made).

In any event, it is well-settled that under 20 C.F.R. §725.310, a district director has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994) (*quoting OKeeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971)). "If a claimant merely alleges that the ultimate fact (disability due to pneumoconiosis) was wrongly decided, the [district director] may, if he chooses, accept this contention and

modify the final order accordingly. There is no need for a smoking-gun factual error, changed conditions, or startling new evidence.'" *Id.* (*quoting Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993)). *See also Betty B Coal Co.*, 1999 WL 960763, at *5 (noting that the "modification procedure is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings"); *Amax Coal Co. v. Franklin*, 957 F.2d 355, 358 (7th Cir. 1992) (describing a new doctor's report, submitted after the denial of a claim, as "new evidence, albeit evidence about the accuracy of the original determination of an ultimate rather than elementary fact," and noting that although such evidence "could not be presented on appeal, [it] should be allowed to be considered as a ground for reopening the case" through modification).

This standard is far more liberal than, for example, the standard that governs motions for reconsideration under the Federal Rules of Civil Procedure. *Compare Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993) (noting that a motion for reconsideration under the Federal Rules is not properly founded on a request that the Court "rethink what [it] had already thought through—rightly or wrongly.") (citation omitted) *with Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 743 (6th Cir. 1997) (noting that in black lung benefits cases, the "fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence . . . . "). The March 28, 1990 letter, therefore, does not disclaim Evelyn Milliken's entitlement to modification based on "a mistake in a determination of fact."

In sum, the district director's decision to treat the February 5, 1990 letter as a request for modification was not erroneous in view of the very low standards for what can suffice as a request for modification.

D. Abandonment on appeal of the widow's presumption

Y & O next argues that by not asserting in her appeal from the ALJ's 1986 order denying benefits—and in her brief defending the Board's subsequent decision before this court—that the ALJ committed reversible error by failing to address her argument that she was entitled to benefits under the "widow's presumption," Evelyn Milliken "accepted that incorrect adjudication." For this proposition, Y & O relies upon *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988).

Sebben, however, was a case in which the claimants failed to pursue administrative remedies or judicial review until after the time for remedies or review had passed. *See* 488 U.S. at 121. The decisions about which they complained had thus become final. *Sebben* simply recognized that the writ of mandamus could not be used to force the Benefits Review Board to reopen a case that had become final, even if incorrectly decided. *See id.* at 122.

The writ of mandamus pursuant to 28 U.S.C. § 1631 is an extraordinary remedy and "will issue only to compel the performance of 'a clear nondiscretionary duty.'" *Sebben*, 488 U.S. at 121 (citation omitted). Clearly, the Board has no "clear nondiscretionary duty" to allow claims to be serially readjudicated after the time for administrative remedies and judicial review has passed. If it did, then no decision of the Board would ever be final. An aggrieved party could simply petition for mandamus and allege a breach of the Board's duty to adjudicate the case correctly, no matter how untimely the petition. No rational system of adjudication would permit this. *See id.* ("This is not the way the law works.") But it does not follow that *Sebben* prohibits the Board from reconsidering claims that it erred when those claims are asserted before the time has expired for administrative remedies and judicial relief.

It is true that arguments not raised in the proponent's opening brief on appeal are generally considered abandoned. *See, e.g., Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir. 1998) (noting that the court of appeals would not consider twelve of thirteen *Bivens* claims asserted by the plaintiff because he only challenged on appeal the dismissal of his thirteenth claim). The Board has a similar rule. *See Niazy v. Capital Hilton Hotel*, No. 87-162, 19 Ben. Rev. Bd. Serv. 266, 1987 WL 107372, at *5 (1987) (refusing to consider discovery issues raised before the ALJ but not on appeal). This rule, however, is prudential and not jurisdictional. *See Dorris v. Absher*, 179 F.3d 420, 425 (6th Cir. 1999) (noting that "the court may choose to entertain arguments not raised by the parties when the failure to do so would constitute a miscarriage of justice"); *Mayhew v. Allsup*, 166 F.3d 821, 823-24 (6th Cir. 1999) (considering the application of a statute helpful to the defendant despite his failure to address it either at trial or on appeal); *Mansfield v. Director, OWCP*, 8 BLR 1-445, 1986 WL 66303, at *1 (1986) (noting, in a black lung benefits case, that "if necessary to reach the correct result and fundamental to the fair administration of the Act, we will sua sponte consider points not raised by any party").

The error about which Evelyn Milliken complained was the first ALJ's failure to consider the applicability of the widow's presumption, which appears not only in the regulations, but in identical form in the authorizing statute itself. Moreover, she argued before the first ALJ that the presumption applied. As discussed in Part C above, neither the later ALJ nor the Board was precluded by this court's prior mandate from considering the argument. We discern no reversible error in the Board's decision to do so.

E. The ALJ's "reweighing" of the evidence

Y & O argues that the ALJ in 1997 improperly "just reweighed the evidence" considered by the ALJ in 1986 without identifying what Y & O considers "any determination

of any mistake in a prior determination of fact." As noted in Part C above, however, an ALJ has the right to reweigh the evidence when considering a timely request for modification pursuant to 20 C.F.R. § 725.310 regardless of whether the issue of disability due to pneumoconiosis is labeled one of "law," "fact," or "ultimate fact." *See, e.g., Worrell*, 27 F.3d at 230.

Y & O suggests that this will "open the proverbial floodgates of litigation" and in many instances will harm claimants, because employers aggrieved by an ALJ's order awarding benefits could serially request modifications, with the result that "Black Lung claims would *never* end." Reluctant as we are to do anything to further prolong the snail-like pace of black lung benefits cases, *see, e.g., Peabody Coal Co. v. Director, OWCP*, 165 F. 3d 1126, 1127 (7th Cir. 1999) (describing a twenty-three year-old black lung case as "typically protracted"); *Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 1046 (7th Cir. 1998) (complaining that a twenty-two year-old black lung case "has dragged out appallingly"); *Amax Coal Co. v. Franklin*, 957 F.2d 355, 358 (7th Cir. 1992) (describing a fourteen year-old black lung case as "unconscionably protracted" and noting that "[s]uch delay is not easy to understand"), we cannot accept Y&O's argument.

For one thing, as noted in Part C above, the Supreme Court in *O'Keeffe* defined the scope of the modification remedy under 33 U.S.C. § 922, and we obviously cannot amend the statute or disregard the way the Supreme Court has interpreted it. That aside, the district director's authority to review compensation cases is discretionary. *See, e.g.*, 33 U.S.C. § 922 (providing that a district director "may. . . review a compensation case"); *Amax Coal Co.*, 957 F.2d at 357 (noting that under 33 U.S.C. § 922, as with requests for reconsideration generally, "[m]otions to reopen or reconsider are appeals to the discretion of the judicial or other officer to whom the motion is made"). *Compare Betty B Coal Co.*,

1999 WL 960763, at *8 (noting that "never-say-die" litigants who abuse the modification procedure by filing repetitive requests for modification are highly unlikely to ultimately prevail on the merits). One must presume that the district directors will be able to exercise their discretion intelligently, and in a manner that will bring an appropriate level of finality to black lung benefits decisions. If they cannot, the coal mining employers' recourse is with the "authorities who can do something about it." *C & K Coal Co. v. Taylor*, 165 F.3d 254, 258 (3d Cir. 1999) (citation omitted).

We also cannot accept Y & O's argument that allowing the ALJ to rethink his conclusions renders either the regulation governing ALJ reconsideration, 20 C.F.R. § 725.479(b), or the regulation governing duplicate black lung claims, 20 C.F.R. § 725.309, meaningless. Y & O reasons that because there is a regulation that permits aggrieved parties to petition the ALJ for reconsideration within thirty days after the ALJ files his decision and order, modification under 20 C.F.R.§§ 725.310 and 725.480 could not give an aggrieved party a full year in which to ask the ALJ simply to rethink his conclusions, because then the one-month time limit of 20 C.F.R. § 725.479(b) would be a nullity. The flaw in this argument is that it overlooks the fact that within thirty days of the ALJ's ruling, an aggrieved party can take up a request for reconsideration directly with the ALJ. After the thirty-day period expires (but before one year elapses), an aggrieved party is required to return almost to square one, because the request for modification under 20 C.F.R. § 725.310 must be addressed to the district director, and thus entails an appeal to another decisionmaker's discretion.

Once a year has passed, the time for modification has run and res judicata will bar subsequent challenges to the correctness of the adjudication. In order to prevail, an aggrieved claimant would need to demonstrate a "material change in conditions," *see* 20 C.F.R. § 725.309(d), which

means that the claimant cannot disturb the now-final adverse adjudication, even if the claimant could establish that it was incorrectly decided. Rather, the claimant would have to demonstrate "that the miner did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application." *Sahara Coal Co. v. OWCP, United States Dep't of Labor*, 946 F.2d 554, 556 (7th Cir. 1991).

Moreover, the present case is not one in which the aggrieved claimant simply "secur[ed] new [medical] opinion evidence," as Y & O argues, and sought modification. This is a case in which the ALJ in 1986 failed to consider the applicability of a presumption that appears not only in the regulations but in the statute itself.

F. Harmless error by the 1986 ALJ

Finally, Y & O argues that the ALJ to whom this case was originally assigned in 1986 made a decision as the factfinder to credit the opinion of a medical expert, Dr. Kress, who had opined that when Harold Milliken died, his level of pneumoconiosis was too minimal to have been the cause of any disability. The ALJ thus found as a fact that neither Harold Milliken's death nor his disability was caused by pneumoconiosis. Y & O argues that this factual finding rendered the ALJ's failure to consider the applicability of the widow's presumption harmless error, because such a finding would be sufficient to rebut the widow's presumption.

The 1986 ALJ's decision and order, however, is not the one under review. Rather, it is the 1997 ALJ's decision and order that is before us. In the modification proceedings, the ALJ considered not only the evidence that had been submitted to the ALJ in 1986, but also a report submitted by an additional expert, Dr. Rasmussen, that critiqued the opinion of Dr.

Kress. Dr. Rasmussen's opinion highlighted the inability of Dr. Kress to adequately explain Harold Milliken's respiratory symptoms. The 1997 ALJ's decision credited this report, and held that Y & O had failed to rebut the widow's presumption with evidence that Harold Milliken was "not partially or totally disabled due to pneumoconiosis" when he died. *See* 30 U.S.C. § 921(c)(5). That decision was affirmed by the Board. We believe, and Y & O in any event does not contest, that the ALJ's latest decision was also supported by substantial evidence.

III. CONCLUSION

For all of the reasons set forth above, Y & O's petition for review is DENIED.

DISSENT

HARRY W. WELLFORD, Circuit Judge, dissenting. Harold Milliken's widow filed for surviving spouse benefits under the Black Lung Benefits Act in 1975, more than a year following her husband's death. She was represented by counsel and presented evidence bearing upon her right to collect benefits. She had ample opportunity to present all her claims. An ALJ decided in early 1986, based upon medical opinions and the death certificate, that the primary cause of death was heart disease. The ALJ found that the deceased miner was not shown to be totally disabled by respiratory or pulmonary impairment at the time of death, although he smoked regularly for many years in addition to working around the mines.

The ALJ, in his 1986 findings, pointed to autopsy reports and analyses which indicated either no finding of pneumoconiosis, or, at best, "simple minimal coal workers' pneumoconiosis." None of the doctors opined the latter as contributing to the miner's death. The reports did indicate, however, the presence of carcinoma in the left lower lobe.

Resolving considerable doubt on this issue of the presence of anthracosis or pneumoconiosis, the ALJ adopted the minority minimal indication. The ALJ concluded, however, that the employer had rebutted plaintiff's interim presumption that death was caused by this minimal indication of pneumoconiosis arising out of coal mine employment and that he was totally disabled by this condition at the time of his death. The final conclusion was that Milliken's disability and death "did not arise out of coal mine employment." The only competent medical evidence on the question at issue was that "the minimum level of pneumoconiosis . . . would make no contribution to his death." The Director's appeal from this decision was dismissed. After the Board first dismissed the widow's appeal as untimely on July 30, 1986, it later accepted a cross-appeal. This demonstrates the beginning of a pattern throughout this case: bending or ignoring the rules in favor of respondent. I dissent from any award of benefits, accordingly.

A divided Board, in January of 1988, reversed the ALJ based on its interpretation of Sixth Circuit law and 20 C.F.R. § 410.490 of the regulations. The case was appealed to this court, and we concluded in 866 F.2d 195 (6th Cir. 1989), that the Board erred. Y&O, supported by the Director, successfully argued that the Board misinterpreted the regulations and Sixth Circuit law. Among other things, we held:

> In this case, the only evidence regarding Milliken's pneumoconiosis consists of the autopsy report conducted by Dr. Karanjawala and the death certificate with an illegible entry of pneumoconiosis as a contributing cause of death. The autopsy report also revealed evidence of heart disease and cancer. The death certificate lists heart disease as the primary cause of death. Moreover, one physician claimed Milliken did not have pneumoconiosis and another found exceedingly mild pneumoconiosis that could not have caused disability or death. A review of the record indicates that the ALJ's finding of rebuttal is

> supported by substantial evidence. We decline to disturb those findings.

866 F.2d at 202-03.

One might assume that this decision, dated January 23, 1989, would have settled this controversy absent a reversal or remand by the Supreme Court or *en banc* consideration by the Sixth Circuit. No such later court action occurred, but now—ten years later--after a multitude of questionable procedural moves and actions by the Board and the agency, the majority decides that administrative actions and decisions may effectually overrule this 1989 decision of our court.[1] This is permitted by the majority in the guise of liberal construction for the benefit of the claimant.

The next action by respondent was to file a petition for rehearing, and a motion for enlargement of time, because, as conceded by the majority, "the time for filing a petition for rehearing had already elapsed." In this petition, respondent reviewed an argument she had raised before the ALJ in 1986, but not before the Board or the Sixth Circuit, based on the "widow's presumption." This court denied the petition, presumably having considered and rejected the arguments advanced. I would hold that respondent, under the circumstances, raised the "widow's presumption" issue but

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[1] The majority concedes that

> The Supreme Court, in *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680 (1991), subsequently held, in apparent agreement with this court's 1989 opinion in this case, that the Labor Department regulations were not inconsistent with 30 U.S.C. § 902(f)(2) to the extent that they allowed the interim presumption to be rebutted with evidence demonstrating that the miner does not or did not have pneumoconiosis or that the miner's disability does not or did not arise out of coal mine employment.

did not pursue it effectually, and failed in this contention before this court.[2]

In sum, I would hold that the 1989 decision of this court, coupled with denial of the petition for review on March 15, 1989, terminated respondent's claims under the Black Lung Benefits Act. But, there were many more unusual and, I believe, unauthorized actions which took place administratively thereafter. I deem them unauthorized and improper because:

(1) The Secretary, an ALJ, and the Board cannot overrule the determination of this court.

(2) The "widow's presumption" issue was presented, although ineptly, in the administrative proceedings prior to, and in the Sixth Circuit (by the contested petition for review).

(3) The findings of the ALJ in 1986, not disturbed by the Board, foreclosed any successful outcome of the "widow's presumption" claim.

On February 5, 1990, more than fifteen years after Harold Milliken's death, and the issuance of a death certificate indicating that Milliken died from heart problems primarily and another "significant condition," carcinoma, Milliken's new attorney mailed to a claims examiner of the Department of Labor a letter "notice." It indicated that respondent did not appeal the Sixth Circuit decision, but that he would set forth grounds of "mistake" in that decision to be "more fully set forth in a modification request I am preparing." He contended

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[2] Milliken did also fully present the "widow's presumption" issue, and moved to stay the mandate, mentioning a possible subsequent petition for certiorari. Y&O filed a memorandum contra to this action of plaintiff indicating a Board decision, *Freeman v. Old Ben Coal Co.*, 3 BLR 1-599, that foreclosed such claim under the findings of the ALJ in 1986.

that "the denial of her claim (not appealed) was not final." It should be pointed out that up to the time of the 1989 decision, respondent had been receiving black lung benefits, and by about 1980, respondent had been eligible for social security benefits.

The February 5, 1990 letter was *not* an appeal, but some kind of advance notice of a requested modification of the Sixth Circuit opinion based upon "mistakes." Prior respondent's counsel had sought to do this very thing by the rejected petition for review. Respondent, then, sought administratively to modify or overturn this court's decision which had affirmed an ALJ determination by means of this vague letter. In a somewhat similar context, this type of letter reference to modification was rejected in *I.T.O. Corp. v. Pettus*, 73 F.3d 523 (4th Cir.), *cert. denied*, 519 U.S. 897 (1996). The court had this to say about this type of approach:

> The Director of OWCP argues that § 922 allows threadbare letters, such as those sent by Pettus in September and December of 1989, to initiate the review process without any subsequent action on the part of the district director. We find this argument unpersuasive. Section 922's requirement that review commence within one year is not automatically fulfilled by just any communication from the claimant. A request for modification constitutes the commencement of review only if it is sufficient to initiate the process required under § 922, a process whose *next step must occur within ten days* of claimant's request for modification. While a claimant's application for modification need not meet any particular form, there must be *some basis* for a reasonable person to conclude that a modification request has been made.

Id. at 527 (emphasis added). As in the *Pettus* case, respondent's attorney's letter made no reference to any "change in [claimant's] condition" or to "additional evidence

concerning claimant's disability," or, in this case, to the cause of death. *Id.* There was, furthermore, a "next step" in the process which "must occur within ten days." Pettus submitted a more particular letter request for modification which was adequate, but like Milliken's March 26 letter, it came too late.

We should not countenance, much less approve, such an action. Respondent's counsel followed through on March 28, 1990, with another letter to the claims examiner enclosing the post-decision filings in the Sixth Circuit which, he said, "sets forth the principal grounds of my February 5, 1990 Request." He proffered *no* newly discovered evidence, and he did not argue "previously litigated facts." It is apparent that he was contending that a mistake of *law* had been made; he was not contesting factual determinations, nor presenting new evidence, but asserting a wrong legal determination by the Sixth Circuit.

There are several things to be said about these letters by respondent's new counsel. The District Director rejected the February 5, 1990 communication as untimely. This should have ended the matter. Instead, as pointed out by the majority, the Director then changed course. Three courts have held that the Director "is without statutory authority under 33 U.S.C. § 922 [dealing with modification of black lung awards] to propose modifications for any mistaken determinations of fact other than his own." *Director v. Kaiser Steel Corp.*, 860 F.2d 377, 379 (10th Cir. 1988). *See also Director v. Peabody Coal Co.*, 837 F.2d 295 (7th Cir. 1988); *Director v. Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987). This circuit's case of *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278 (1987), was deemed inapposite in *Kaiser Steel* to this particular issue. *Saginaw Mining* simply held that "a claimant for benefits under the BLBA must file with a deputy commissioner, rather than an ALJ, a request for modification of *an ALJ decision*." 818 F.2d at 1283 (emphasis added). *Saginaw Mining* did *not* involve an ALJ decision that had been reviewed without a

challenge to the facts by the Board, and which decision had been *affirmed* by this court.[3] I would hold that the Director had no authority, under these circumstances, to entertain a request for modification based on a claimed mistake of fact.

Section 922 limits modification to "a change in conditions," not demonstrated in this case, or "because of a mistake in a determination of fact by the deputy commissioner." 33 U.S.C. § 922. The Director in this case stands § 922 on its head as does the majority in overturning effectively ("modifying") through administrative gyrations the prior decision of this court. As stated, there is no authority for the Director (much less a claims examiner) to consider a modification of a Sixth Circuit judgment based on a purported "mistake" of fact, when respondent offered no new evidence nor a dispute over litigated facts. This is apart from the controversy as to whether the request for modification was timely.

The February 5, 1990 communication was not a request for modification nor did it set forth grounds. The first purported request was March 28, 1990, and this was untimely. This is an additional basis for rejection of the ultimate, subsequent administrative decision favoring respondent. Furthermore, respondent demonstrated no *factual* error in the ALJ decision affirmed by this court, nor in any factual determination made by this court in 866 F.2d 195. The time limit for filing expired, at the latest, on March 23, 1990. 1 would hold that the time period expired a year from the earlier date of the judgment of the Sixth Circuit, January 23, 1989.

The majority attempts to convert what clearly is a claim by respondent that a mistake of law occurred by suggesting that

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[3] *Saginaw Mining* discussed modification proceedings based upon the facts in that case: should a claimant file a modification request in a pending proceeding with the ALJ pending a Board Review or with the deputy commissioner in order to present new evidence. This is inapposite to the issues before us in this controversy.

the ultimate determination by the ALJ, and by this court, that Milliken's claim be denied.

Despite the deficiencies in the process, there was a subsequent decision administratively to deny the requested modification in 1993. The Board, in 1995, reversing and remanding the sound decision of the ALJ, which ratified the rationale of the 1986 ALJ determination, observed about the timeliness of the modification request:

> [C]laimant's February 5, 1990 letter to Claims Examiner Michael McClaran is sufficient notification of claimant's intention to request modification of her denied claim, by stating that the formal petition for modification was being prepared for filing with the district director [similar to the previous term, deputy commissioner].

The only import of the February 5, 1990 letter in controversy was that it stated that a petition for modification *was being prepared*. Will we permit indefinite extensions of statutory time limits by some vague indication, without specifying reasons, that a petition is being prepared for filing sometime in the future? This judge certainly hopes that we will not countenance such winking and shrugging-off of the demands of the law which, after all, set an ample one-year limit. The Board was in error in disregarding that this court had affirmed the 1986 findings—there was no erroneous "finding [of fact] rendered by an administrative law judge" in 1986. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227 (6th Cir. 1994), simply holds that a deputy commissioner may "rethink a prior finding of fact at any time *during the first year* after a final order." *Id.* at 230 (emphasis added). *Worrell*,[4] however, did not involve a final order of this court ratifying and affirming a prior ALJ determination of fact. No case cited by the majority involves the circumstances involved in this case,

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[4] *Worrell* involved study of new medical evidence and conflicting medical studies, unlike the situation in the instant case.

attempted modification of a judgment of a court of appeals by a later, long delayed action of an administrative agency. Nothing by way of adequate request for modification, in any event, it occurred within the one year permitted. Respondent even sought, properly I believe, by a petition for review and answered by Y&O, to raise the new contention in the Sixth Circuit, but this was denied and should have ended any administrative modification effort.

In the Board's 1995 holding moreover, the alleged error in the 1986 ALJ decision was "in failing to apply the presumption set forth in Section 727-204, see Section 411 (c)(5) of the Act." Unquestionably, if this was error, it was an error of law, not of fact, and was not subject to modification.

The only new evidence of any import introduced at a modification hearing was a "consultive medical report by Dr. D. C. Rasmussen." This came about seventeen years after Milliken's death and medical evidence much more current and relevant to the pertinent times.

The 1997 ALJ decision, on remand, affirmed by the Board this time, required Y&O to establish that Milliken was not, at death, partially or totally disabled by pneumoconiosis. At the time of death, Milliken had already retired. In his analysis of Dr. Rasmussen's consultive report, the ALJ noted that (1) "the record did not contain pulmonary function studies, and that "it is impossible to determine whether the miner suffered impairment of lung function as a result of pneumoconiosis," and (2) the anatomical evidence is insufficient to establish or disconnect a link between the miner's symptoms and pneumoconiosis." It is difficult to see how Dr. Rasmussen added anything to the extensive previous discussions of other doctors indicating, at *most*, minimal signs of pneumoconiosis but major symptoms of heart disease and cancer that brought about Milliken's death. Coupled with these conditions were broken ribs that caused breathing problems and long-term smoking.

On the merits of the case, then, I would not disturb the earlier fact findings and conclusions of the ALJ in 1986 and this court's judgment. Respondent abandoned or waived her widow's presumption argument before our court before filing a petition to review. There was no miscarriage of justice in those decisions by any stretch. The earlier ALJ decision, based on essentially the same facts and circumstances, was that "neither Milliken's death or disability was caused by pneumoconiosis. That was affirmed by the Sixth Circuit. That precludes a proposed finding of factual error or any basis for modification under the circumstances.

I must express my concern that the majority opinion extends, without any sound basis, any prior court law and thus allows a kind of extended and haphazard procedure, without any effective limitation, to allow modification of a circuit court decision. This majority view certainly encourages parties who fail to exercise due diligence in pursuing their claims or defenses to become " 'never-say-die' litigators who abuse the modification procedure by filing repetitive requests."

I would REVERSE the granting of benefits in this case.

APPENDIX B

U.S. Department of Labor
Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 97-1519 BLA
Date Issued: Sep 30, 1998

EVELYN MILLIKEN
(widow of HAROLD G. MILLIKEN)
Claimant-Respondent

v.

YOUGHIOGHENY & OHIO COAL COMPANY
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

DECISION AND ORDER

Appeal of the Supplemental Decision and Order on Remand of George P. Morin, Administrative Law Judge, United States Department of Labor.

PER CURIAM:

Employer appeals the Supplemental Decision and Order on Remand (91-BLA-2770) of Administrative Law Judge George P. Morin awarding survivor's benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is before the Board for the

second time on claimant's Petition for Modification.[1] In his original Decision and Order issued on April 15, 1993, the administrative law judge found claimant's petition for modification to be timely filed and that he had jurisdiction over the claim. The administrative law judge stated that a change in conditions was not at issue in this case involving a survivor's claim and no credible argument had been made in support of a claim that a mistake in a determination of fact was made. The administrative law judge further noted that the only argument claimant raised was that a different result would have been reached if the presumption at 20 C.F.R. §727.204 been applied. The administrative law judge found that Administrative Law Judge W. Ralph Musgrove's failure to apply the 20 C.F.R. §727.204 presumption in the initial Decision and Order, dated January 16, 1986, was a mistake of law and, therefore, was not proper grounds for modification.[2]

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[1] Claimant is the widow of the miner, Harold Milliken, who died on July 19, 1975. Director's Exhibit 7. The survivor's claim is the only claim before the Board.

2 The procedural history of this case, in part, is as follows. Claimant filed her application for survivor's benfits on August 5, 1977. Director's Exhibit 1. Administrative Law Judge W. Ralph Musgrave, in a Decision and Order issued on January 16, 1986, credited the miner with forty years of coal mine employment. Judge Musgrove found the autopsy evidence sufficient to establish invocation of the interim presumption under 20 C.F.R. § 727.203(a)(1). Judge Musgrove also found that the evidence was sufficient to establish rebuttal of the interim presumption under Section 727.203(b)(3) on the basis that the evidence established that the miner's disability or death did not arise out of coal mine employment. Judge Musgrove also found the evidence insufficient to establish entitlement under 20 C.F.R. Part 410, Subpart D, and denied benefits. On appeal, the Board reversed the administrative law judge's denial of benefits, holding that claimant was entitled to the benefit of the presumption set forth at 20 C.F.R. §410.490 and that the evidence was insufficient to establish rebuttal of this presumption. In addition, the Board noted that, in light of its decision under Section 410.490, the Board need not address the administrative law judge's findings pursuant to Section 727.203. *Milliken v. Youghiogheny & Ohio Coal Co.*, BRB No. 86-434 BLA/A (Jan 29,

Accordingly, the administrative law judge denied claimant's petition for modification.

Pursuant to claimant's appeal and employer's cross-appeal, the Board affirmed the administrative law judge's findings that the request for modification was timely filed and also that the administrative law judge had jurisdiction over the request for modification. *Milliken v. Youghiogheny & Ohio Coal Co.*, BRB Nos. 93-1529 BLA/A (June 21, 1995)(unpub.). However, based on the decision of the United States Court of Appeals for the Sixth Circuit in *Consolidation Coal Co. v. Worrell,* 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994),[3] and the

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1988)(unpub.). On appeal, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case lies, reversed the Board's award of benefits, holding that the presumption set forth at Section 410.490 is not applicable in this claim and reinstated the administrative law judge's findings pursuant to Section 727.203. The court affirmed the administrative law judge's finding of rebuttal of the interim presumption at Section 727.203(b)(3) and his denial of benefits as supported by substantial evidence. *The Youghiogheny & Ohio Coal Co. v. Milliken,* 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989). Claimant filed a Petition for Rehearing on February 14, 1989, requesting the court to review the case pursuant to 20 C.F.R. §727.204. Director's Exhibit 23. Employer responded to claimant's Petition for Rehearing, urging denial of claimant's request. Director's Exhibit 24. The court summarily denied claimant's petition, Director's Exhibit 25, and entered its judgment by mandate on March 15, 1989. *The Youghiogheny & Ohio Coal Co. v. Milliken,* No. 88-3213 (Mar.15, 1989)(Order)(unpub.). On February 5, 1990, claimant informed the Office of Workers' Compensation Programs of her intent to formally petition for modification of her denied claim. Director's Exhibit 26.

[3] *In Consolidation Coal Co. v. Worrell,* 27 F.3d 227, 18 BLR 2-290 (6th Cir.1994), the United States Court of Appeals for the Sixth Circuit held that once a request for modification is filed, regardless of the grounds stated, if any, the fact-finder must consider all of the evidence for any mistake of fact or change in conditions. Included in the determination of a mistake in fact is the determination of the ultimate fact, which is claimant's entitlement to benefits. *Worrell, supra.*

availability of modification wherein the issue involves a mixed question of law and fact, the Board vacated the administrative law judge's denial of modification and also his denial of benefits. *Id.*, slip op. at 5-6. The Board held that claimant was entitled to the benefit of the presumption set forth at Section 727.204, *see* Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5),[4] which, while argued before Judge Musgrove, was not applied in the original adjudication of this case. The Board thus held that Judge Musgrove's mistaken interpretation of the applicable regulations gave rise to a mixed question of law and fact. *Id.* The administrative law judge, therefore, was instructed to consider all of the evidence, that is, the evidence submitted with the original claim as well as the newly submitted evidence, under the regulatory criteria set forth at Section 727.204. *Id.*, slip op. at 7. The Board denied employer's subsequent Motion for Reconsideration, thereby affirming its 1995 Decision and Order. *Milliken v. Youghiogheny & Ohio Coal Co.*, BRB Nos. 93-1529 BLA/A (Feb. 27, 1997)(Order on Recon.) (unpub.).

On remand, the administrative law judge found that claimant established invocation of the Section 727.204 presumption inasmuch as claimant established that the miner was employed for at least forty years, ending in 1973, and that the miner died prior to March 1, 1978. In addition, the administrative law judge determined that employer failed to produce evidence tending to show that the miner's disability at the time of his death was not due to pneumoconiosis and, therefore, found that employer failed to establish rebuttal of

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[4] Section 411(c)(5) of the Act provides a rebuttable presumption of entitlement to benefits to eligible survivors of a miner who was employed for twenty-five years of more in coal mines before June 30, 1971 and who dies on or before March 1, 1978. 30 U.S.C. §921(c)(5), as implemented at 20 C.F.R. §727.204.

the Section 727.204 presumption. Consequently, the administrative law judge awarded benefits.

On appeal, employer contends that the Board erred in finding that *Worrell* is controlling in this case and thus erred in remanding the case to the administrative law judge for further consideration of the modification issue. Specifically, employer contends that the Board erred in applying cases, *i.e.*, *Worrell* and *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), which address factual situations involving vague modification requests to this case where claimant made a specific argument regarding her request for modification. Employer further contends that the administrative law judge erred in failing to render a specific mistake in a determination of fact finding pursuant to Section 725.310 prior to considering this case on the merits. In addition, employer contends that, contrary to the Board's holding in its June 1995 Decision and Order, the issue of invocation of the Section 727.204 presumption is not a mixed question of law and fact. Therefore, employer argues that the Board should reinstate the prior denial based on the finding of 20 C.F.R. §727.203(b)(3) rebuttal by Judge Musgrove in his 1986 Decision and Order, which employer contends also establishes rebuttal of the Section 727.204 presumption. Lastly, employer contends that the administrative law judge erred in weighing the medical opinion evidence anew and arriving at a different conclusion than Judge Musgrove inasmuch as Judge Musgrove's weighing of these opinions had been affirmed on appeal.

In response, claimant urges affirmance of the administrative law judge's award of benefits. In addition, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's award of benefits, contending that the administrative law judge is not required to render a separate mistake in a determination of fact finding inasmuch as it is subsumed into

the merits finding. In addition, the Director contends that the administrative law judge applied the correct legal standard in considering rebuttal pursuant to Section 727.204. In its reply brief, employer argues that the response briefs filed by claimant and the Director fail to address employer's argument that the Board erred in citing cases which allow for a vague modification request to be controlling in this case. In addition, employer contends that Judge Musgrove's findings are sufficient to establish rebuttal of any presumption applicable in this case and, therefore, benefits should be denied. Employer further argues that the Director "misses the point" in this case wherein he argues that the rebuttal provisions are different for Sections 727.203 and 727.204.[5] Employer's Reply Brief at 4-5.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921 (b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we reject employer's contention that the Board, in its 1995 Decision and Order, erred in relying on cases which refer to vague modification requests, in a case where claimant has made a specific modification request and allegation of error. Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by Section 725.310, provides that upon his own initiative, or upon the request of any party on the ground of a change in conditions

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[5] The parties do not challenge the administrative law judge's determination that claimant established invocation of the Section 727.204 presumption; we, therefore, affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time prior to one year after the denial of a claim, reconsider the terms of an award or a denial of benefits. Pursuant to Section 725.310, the fact-finder is vested with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely reflection on the evidence initially submitted.[6] *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *see also Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997). Moreover, the broad discretion to correct mistakes of fact is not limited to particular factual errors. *O'Keeffe, supra; Worrell, supra; Jessee, supra.*

Employer further contends that the administrative law judge erred in failing to render an initial determination regarding whether the record supports a finding of a mistake in a determination of fact before reaching the merits of the claim. Employer contends that the administrative law judge must render a specific finding as to why he has chosen to modify the prior decision and not merely just modify that decision. This argument lacks merit.

Contrary to employer's contention, the administrative law judge, in rendering his decision regarding modification, stated that he was reviewing "the record for a mistake in a determination of fact, namely, that claimant was erroneously denied entitlement under §727.204." Decision and Order at 4. The administrative law judge then reviewed the entire medical evidence of record and found that the evidence was insufficient to establish rebuttal of the Section 727.204

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[6] The decisions cited by employer do not support employer's contention that the administrative law judge provided an improper analysis upon modification. *See* Employer's Brief at 11-12.

presumption and, thus, found that claimant was entitled to benefits. Decision and Order at 4-7. Consequently, as the Director correctly contends, within the administrative law judge's decision on the merits is the determination that, based upon "further reflection on the evidence," *O'Keeffe,* 404 U.S. at 256, the earlier decision contained a mistake in fact. *See Kovac v. BCNR Mining,* Corp., 14 BLR 1-156 (1990), *modified on recon.,* 16 BLR 1-71(1992); *see also Eifler v. Director, OWCP*, 926 F.2d. 663, 15 BLR 2-1 (7th Cir. 1991). Moreover, contrary to employer's contention, the administrative law judge's reasoning and the path he utilized in arriving at his decision are readily discernible. *See* Decision and Order at 4-6. Therefore, employer's reliance on *Eifler*, to require that this case be remanded, is misplaced because the problems inherent in *Eifler* which necessitated remanding the case, that is, that the Seventh Circuit court could not discern why the administrative law judge acted as he did, are not present herein and, therefore, remanding this case for the administrative law judge to formally state his grounds for modification would not serve a valid purpose in this case. *See Eifler, supra; see generally Old Ben Coal Co. v. Scott,* 144 F.3d 1045, BLR (7th Cir. 1998).

Employer further contends that the administrative law judge erred in weighing the medical opinion evidence anew inasmuch as Judge Musgrove's finding that there was no disability of any kind arising from coal mine employment based on the medical opinion of Dr. Kress, was upheld on remand, by the Sixth Circuit, and, therefore, does not contain a mixed question of fact and law requiring modification. Employer's Brief at 18. Employer, therefore, contends that inasmuch as this original finding was one of no disability of any kind arising out of coal mine employment, it is sufficient to establish not only rebuttal at Section 727.203(b), but also sufficient to establish rebuttal of the Section 727.204 presumption. Employer's Brief at 18-19. Thus, employer

argues that the administrative law judge should not have reweighed the evidence of record in determining whether the employer has established rebuttal of the Section 727.204 presumption inasmuch as the undisputed findings of Judge Musgrove establish rebuttal at Section 727.204. *Id.*

In finding that the evidence is insufficient to establish rebuttal of the Section 727.204 presumption,[7] the administrative law judge initially noted that Judge Musgrove's 1986 Decision and Order found the existence of pneumoconiosis established by autopsy and, therefore, the administrative law judge found that rebuttal may not be established by a showing that the miner did not have pneumoconiosis. Decision and Order at 4. Thereafter, the administrative law judge set forth and discussed each of the medical opinions of record.[8]

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[7] The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has adopted a three-prong test for establishing rebuttal of the Section 727.204 presumption. This presumption will be rebutted if the party opposing entitlement establishes that (1) the miner did not have pneumoconiosis, or (2) the miner was not at least partially disabled at the time of death, or (3) the disability which the miner suffered at the time of death was not due to the miner's pneumoconiosis. *Begley v. Consolidation Coal Co.*, 826 F.2d 1512, 10 BLR 2-265 (6th Cir. 1987); *see also Arch Mineral Corp. v. Director, OWCP [Degenhardt]*, 798 F.2d 215 (7th.Cir. 1986).

[8] The administrative law judge correctly set forth all of the relevant medical opinion evidence of record. Although Dr. Karanjawala, the autopsy prosector, noted some degree of anthracosis and fibrosis upon microscopic examination, he did not include pneumoconiosis among the final anatomic diagnoses. Director's Exhibit 8. Dr. Hales, in his 1977 opinion, reviewed the autopsy slides and found that minimal pneumocomosis was present based on the presence of anthracotic pigment. Director's Exhibit 11. In addition, Dr. Hales diagnosed adenocarcinoma of the lung and mild focal emphysema. *Id.* Dr. Freeman, the miner's treating physician, in a letter dated May 5, 1976, stated "that, as of July 1973, the miner was unable to perform outside work due to shortness of breath, cough and chest pains," and that the miner had severe bouts of upper and lower respiratory tract infections. Director's Exhibit 11. However, Dr. Freeman did not state whether pneumoconiosis was present or that the

Decision and Order at 5-6. In weighing the medical opinion evidence pursuant to rebuttal at Section 727.204(c), the administrative law judge found that the medical opinion of Dr. Rasmussen was the most persuasive medical opinion of record. Noting that employer carried the burden of proof on rebuttal, the administrative law judge found that employer did not produce evidence tending to show that the miner's disability, at the time of his death, was not due to pneumoconiosis. Decision and Order at 6.

In challenging the administrative law judge's award of benefits, employer focuses on the issue of whether the administrative law judge properly reconsidered the medical opinion evidence of record rather than accepting the interpretation of this evidence by Judge Musgrove in his 1986

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disability was related to pneumoconiosis. *Id.* In a 1980 medical opinion, Dr. Kress reviewed the medical evidence of record and opined that the miner's death was not due to pneumoconiosis, but that the miner's death was due to cardiac arrest. Director's Exhibit 16. Dr. Kress also opined that pneumoconiosis was not a contributing cause of the miner's death, since the minor degree of pneumoconiosis found in the miner's lungs would never be expected to cause any significant, measurable respiratory impairment. *Id.* Rather, Dr. Kress opined that the lung cancer diagnosed on autopsy was wholly responsible for the miner's inability to perform his usual coal mine employment. *Id.* Dr. Kleinerman, in his 1982 report, reviewed the medical evidence of record, and opined that there was no evidence of pneumoconiosis. Director's Exhibit 17. Dr. Kleinerman further opined that the miner was not disabled due to pneumoconiosis but that the miner's lung cancer was responsible for the miner's inability to perform his usual coal mine employment. *Id.* Lastly, the record contains the 1992 medical opinion of Dr. Rasmussen, Board-certified in Internal Medicine, who reviewed all of the medical opinion evidence of record and opined that it is impossible to determine whether the miner suffered impairment of lung function as a result of pneumoconiosis. Claimant's Exhibit 1. Specifically, Dr. Rasmussen opined that the anatomical evidence is insufficient to establish or disconnect a link between the miner's symptoms and pneumoconiosis; however, the miner did suffer from a significant respiratory impairment prior to his death. *Id.*

decision, which employer contends was sufficient to establish rebuttal of the Section 727.204 presumption. Contrary to employer's contention that the administrative law judge erred in considering the medical evidence of record anew, modification pursuant to Section 725.310 is not limited to particular factual errors resulting from the reevaluation of previously submitted evidence, but may include factual errors as demonstrated by the consideration of new evidence. *See O'Keeffe, supra.* Specifically, as noted *supra*, the inherent purpose of modification is to grant the fact-finder the broad discretionary power to correct mistakes, whether demonstrated by wholly new evidence, cumulative evidence, or merely after further review of the evidence originally submitted. *O'Keeffe, supra; Hunt, supra; see also Worrell, supra.* Consequently, contrary to employer's contention, the administrative law judge properly considered all of the original evidence of record anew, as well as in combination with the newly submitted report of Dr. Rasmussen and, thus, within a reasonable exercise of his discretion, determined that this evidence, as a whole, was insufficient to establish rebuttal of the section 727.204 presumption. *Id.* The administrative law judge, therefore, implicitly determined that Judge Musgrove's general finding that the opinion of Dr. Kress was sufficient to rebut any presumption available to claimant was a mistake in a determination of fact, *see* 1986 Decision and Order at 9.

Finally, employer fails to challenge the administrative law judge's specific findings concerning rebuttal of the Section 727.204 presumption, including his determination that the opinion of Dr. Rasmussen was the most persuasive opinion of record and that it was insufficient to establish that claimant's disability at the time of his death was to due to pneumoconiosis. Therefore, we affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6BLR 1-710 (1983) *see also Sarf v. Director, OWCP, 10 BLR*

1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, we affirm the administrative law judge's award of benefits. *See* 20 C.F.R. §727.204(c).

Accordingly, the administrative law judge's Supplemental Decision and Order on Remand is affirmed.

SO ORDERED.

/s/ BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ ROY P. SMITH
Administrative Appeals Judge

/s/ JAMES F. BROWN
Administrative Appeals Judge

APPENDIX C

U.S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220

Case No. 91 BLA-2770
OWCP No. 282-05-5402

DATE ISSUED: Jul 16, 1997

In the
Matter of

EVELYN MILLIKEN (wid. of HAROLD MILLIKEN)
Claimant,

v.

YOUGHIOGHENY & OHIO COAL CO.
Employer.

and

DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS
Party-in-Interest

SUPPLEMENTAL DECISION AND ORDER ON REMAND

This supplements the Decision and Order - Denying Modification, issued April 15,1993, and is issued pursuant to the Decision and Order of the Benefits Review Board ("the Board" or "the BRB" hereinafter), issued June 21, 1995. Evelyn Milliken's quest for black lung benefits, based on the

40 year coal mining work history of her deceased husband, Harold Milliken, began August 5, 1975, after her husband's death on July 19, 1975, when she filed her claim. She was initially found entitled to receipt of benefits by the district director on September 23, 1980, and payment was initiated from the Black Lung Disability Trust Fund when the responsible operator declined to assume responsibility for payments. A hearing was held before Administrative Law Judge W. Ralph Musgrove on July 17, 1985. Judge Musgrove, following the evidentiary portion of the hearing and oral argument by counsel for claimant and the employer, in a Decision and Order issued January 16, 1986, found the case to be governed by the Part 727 regulations. He found claimant to have invoked the interim rebuttable presumption at 20 C.F.R § 727.203 that the miner had pneumoconiosis arising out of coal mine employment from which he was totally disabled at the time of his death or that his death was caused by pneumoconiosis, based on the finding at autopsy of "some degree of anthracosis or fibrosis" which he found to be pneumoconiosis. Nevertheless, based on a medical opinion concluding that neither the miner's disability nor his death was the result of pneumoconiosis, the judge found the presumption to have been rebutted pursuant to § 727.203(b)(3). The judge did not consider claimant's entitlement to benefits pursuant to the so-called 25-year widows' presumption, found at § 727.204, although, in argument, claimant's counsel had urged him to do so.

Claimant appealed *pro se*, and the Board, finding the presumption at 20 C.F.R § 410.490 to be available to claimant; to have been invoked; and to not have been rebutted by employer, reversed the administrative law judge and found claimant to have established entitlement to benefits as a matter of law. The employer appealed to the United States Court of Appeals for the Sixth Circuit, which found the § 410.490 presumption to have been rebutted, applying

§ 727.203(b) rebuttal standards, and reinstated the administrative law judge's order denying benefits. Neither the Board nor the Court of Appeals alluded to the § 727.204 presumption.

Claimant filed a petition for modification and, following lengthy correspondence between counsel for the claimant and the employer and a claims examiner, and an informal conference, the Acting District Director, on September 18, 1990, denied the claim. Pursuant to claimant's request, a hearing was held before me on April 21, 1992, at which claimant and Mr. Dominic Ferri, a co-workers of claimant's husband, testified, and, among other exhibits, a consultative medical report by Dr. D. L. Rasmussen was offered and received in evidence.

In my Decision and Order - Denying Modification I found no basis for modification in that change in condition is not at issue in a survivor's claim, no mistake in a determination of fact had been shown, and under Board precedent, a mistake of law, if one had been made, may not be corrected by modification. Claimant appealed my decision and employer filed a cross-appeal.

The Board, in its June 21, 1995, Decision and Order, cited a Sixth Circuit case, decided subsequent to issuance of my Decision and Order, *Consolidation Coal Co. v. Worrell,* 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), which held that once a request for modification has been filed, regardless of the grounds stated, if any, the district director must consider all the evidence for any mistake of fact or change in conditions, and that included in the determination of a mistake of fact is the determination of the ultimate fact, which is claimant's entitlement to benefits. The Board found that this case involved a mixed question of fact and law, and that as such, under Board precedent (citations omitted) it is properly the subject of modification proceedings. The case was remanded to me for further consideration of all the relevant evidence,

specifically, the evidence submitted in the original case and the new evidence submitted with the petition for modification, pursuant to § 727.204. In compliance with the Board's remand order, I now review the evidence of record to determine whether the presumption applies, and, if so, whether it has been rebutted. A finding that the claimant is not entitled to benefits under Part 727 necessitates a determination of whether eligibility is established under Part 718. *See Knuckles v. Director, OWCP*, 869 F-2d 996 (6th Cir. 1989).

The Board directed consideration of this claim pursuant to the § 727.204 rebuttable presumption of entitlement, which states:

> (a) In the case of a miner who died on or before March 1, 1978, who was employed for 25 or more years in one or more coal mines prior to June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, unless it is established that at the time of death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Office, furnish such evidence as is available with respect to the health of the miner at the time of death, and the length of the miner's coal mine employment.
>
> (b) For the purpose of this section a miner will be considered to have been "partially disabled" if he or she had reduced ability to engage in his or her usual coal mine work or "comparable and gainful work" (see part 718 of this subchapter as amended from time to time).

20 C.F.R. § 727.204. Thus, claimant may invoke the presumption of entitlement upon a showing that: (1) the miner died on or before March 1, 1978; and, (2) the miner was employed for 25 or more years in the coal mines prior to June 30, 1971.

The record reflects that the miner died on July 19, 1975. (DX 7) Previously, claimant demonstrated forty (40) years of qualifying coal mine employment. (DX 22) The miner retired from coal mine employment on June 28, 1973. (TR 1 [1] at 15). Thus, at least twenty five (25) years of the miner's coal mine employment occurred before June 30, 1971. Accordingly, I find that claimant has satisfied the requirements for invoking the § 727.204 presumption of entitlement.

REBUTTAL OF PRESUMPTION

Rebuttal of the presumption may be accomplished, generally, by producing evidence that the miner's ability to perform his usual coal mine work was not reduced at the time of death, or that the miner did not have pneumoconiosis.[2] *See Short v. Westmoreland Coal Co.*, 110 BLR 1-127 (1987). However, rebuttal may not be accomplished by production of certain types evidence standing alone.[3]

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[1] TR1 Formal Hearing held July 17, 1985, before Judge Musgrove, in Wheeling, West Virginia.

[2] 20 C.F.R. § 727.204(c) states, "[i]n order to rebut this presumption the evidence must demonstrate that the miner's ability to perform his or her ususal and customary work or "comparable and gainful work" was not reduced at the time of his or her death or that the miner did not have pneumoconiosis." *See also Freeman v. Old Ben Coal Co.*, 3 BLR 1-599, 1-604 (1981) (requiring proof that any disability that might have existed was not caused by pneumoconiosis). In *Freeman*, the Board held the presumption rebutted, as there was no evidence that the miner was disabled. 3 BLR 1-604.

[3] 20 C.F.R. § 727.204(d) states, "[t]he following evidence alone shall not be sufficient to rebut the presumption:

(1) Evidence that a deceased miner was employed in a mine at the time of death;

(2) Evidence pertaining to a deceased miner's level of earnings prior to death;

The January 16, 1986 Decision and Order denying benefits concluded that claimant demonstrated the existence of pneumoconiosis by autopsy evidence pursuant to § 727.202. As such, the employer may not rebut the presumption of entitlement with evidence that the miner did not suffer from pneumoconiosis.

Judge Musgrove concluded that the medical evidence failed to show that the miner was totally disabled by respiratory or pulmonary impairment at the time of his death, and that the evidence failed to show that the miner was able to perform his coal mine job from a pulmonary standpoint. (D&O at 7). Accordingly, Judge Musgrove determined that the employer failed to rebut the interim presumption under § 727.203(b)(2). Judge Musgrove applied the "significant relationship test" to determine that the employer rebutted the presumption under § 727.203(b)(3).

However, I review the record for a mistake in a determination of fact, namely, that claimant was erroneously denied entitlement under § 727.204. Thus, the employer must show that the miner's ability to perform his usual coal mine work was not compromised due to pneumoconiosis at the time of his death, and, in accordance with *Freeman,* 3 BLR 1-604, that the miner's disability was not caused by pneumoconiosis.

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(3) A chest X-ray interpreted as negative for the existence of pneumoconiosis;

(4) A death certificate which makes no mention of pneumoconiosis.

See also Short v. Westmoreland Coal Co., 10 BLR 1-127, 1-129 (1987) (holding that more than one of these elements may be sufficient to rebut presumption).

The following evidence is probative of the miner's ability to perform his ususal coal mine work: [4]

The miner died on July 19, 1973. The miner's death certificate was prepared by Dr. Charles Evans. (DX 7) Dr. Evans considered the autopsy findings in concluding the immediate causes of death to be cardiac arrest, arteriosclerotic heart disease, and general arteriosclerosis. Dr. Evans lists one or more items as other significant factors contributing to death, but the only which is legible is carcinoma. Judge Musgrove concluded that the certificate may read, "minimal pneumoconiosis." That finding would correspond with Dr. Karanjawala's findings of anthracosis and fibrosis.

The July 19, 1975 report of the autopsy prosector, Dr. Karanjawala, identifies six items in the final anatomic diagnosis, but does not identify pneumocomosis. (DX 8) They are: bronchogenic carcinoma, large cell type left lower lobe; metastases to hilar and paratracheal lymph nodes, primary lung; infiltration of the soft tissue of the chest, left side posteriorly and the left seventh rib by carcinoma of the lung; arteriosclerotic heart disease; generalized arteriosclerosis, moderate; and, calcified nodule left lower lobe of the thyroid. Upon microscopic examination, Dr. Karanjawala finds "some degree of anthracosis and fibrosis." Dr. Karanjawala notes that the autopsy was performed to rule out pneumoconiosis, but does not state his resolution of that question.

The May 5, 1976 letter of Dr. Freeman finds that the miner did have a pulmonary disability. (DX 11) Dr. Freeman also remarks that, as of July, 1973, the miner was unable to perform outside work due to shortness of breath, cough and

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[4] The record does not contain any evidence of qualifications or certifications of the commenting physicians. However, Judge Musgrove apparently took official notice that, at the time of the decision, Dr. Karanjawala was a board certified pathologist, while Dr. Kleinerman was a specialist in pathology without board certification.

chest pains. Dr. Freeman notes that the miner had severe bouts of upper and lower respiratory tract infections with expectoration of large amounts of mucus. Dr. Freeman does not state whether pneumoconiosis is present or that the disability is related to pneumoconiosis.

The April 27, 1977 consultative report of Dr. Milton R. Hales reviews the autopsy slides. (DX 11) Dr. Hales notes that most of the slides were taken from the lung tumor. The histologic slides also show mild focal emphysema, and a modest amount of anthracotic pigment with a few macules. The only feature suggesting the presence of pneumoconiosis, according to Dr. Hales, is that the anthracotic pigment is more prominent within the cytoplasm of intraalveolar macrophages. Dr. Hales concludes that minimal pneumoconiosis was present, based on the presence of anthracotic pigment. In sum, Dr. Hales diagnosed adenocarcinoma of the lung, small acute infarcts of the lung, acute focal necrotizing pneumonia, mild focal emphysema, and simple coal workers' pneumoconiosis.

The October 20, 1980 report of Dr. Kress reviews the medical evidence of record, and concludes that the miner's death was not due to pneumoconiosis. (DX 16) Relying on the autopsy material, Dr. Kress finds that the miner died of cardiac arrest secondary to arteriosclerotic cardiovascular disease. Dr. Kress notes that an apparently undetected tumor mass was discovered during the autopsy. Moreover, pneumoconiosis did not contribute to the miner's death, as the anatomic and histologic evidence suggests only a mild presence of pneumoconiosis which could not have accounted for any impairment suffered by the miner. Dr. Kress states that the minor presence of pneumoconiosis found in the miner's lungs would never be expected to result in significant measurable pulmonary or respiratory impairment. Dr. Kress questions the findings of Dr. Freeman, the miner's treating physician, by providing alternate causes for the miner's symptomatology, and concludes that Dr. Freeman's findings

do not support a finding of partial disability. Finally, Dr. Kress states that it is "inconceivable that he could have had any impairment or disability attributable to pneumoconiosis. Moreover, the cancer identified at autopsy was wholly responsible for the miner's inability to perform his former coal mine employment."

The April 9, 1982 report of Dr. Kleinerman fails to diagnose the presence of pneumoconiosis based on a review of the medical evidence. (DX 17) Dr. Kleinerman noted an undocumented smoking history and a 40 year coal mine employment history, although he does not identify the miner's coal mine job titles or duties. The histological slides reveal the presence of adenocarcinoma, pulmonary edema, mild degree of interstitial fibrosis, and a small amount of black pigment in the lung tissue and pleura. As a result of his finding of no pneumoconiosis, Dr. Kleinerman concludes that the miner was not disabled as a result of pneumoconiosis, and that pneumoconiosis did not prevent the miner from performing his usual coal mine duties. Dr. Kleinerman also concludes that lung cancer was responsible for the miner's inability to perform his usual coal mine employment. However, Dr. Kleinerman's medical opinion is less probative for rebuttal purposes, as he did not diagnose pneumoconiosis.

The February 26, 1992, report of Dr. D. L. Rasmussen reviews the medical evidence of record. (CX 1) Dr. Rasmussen notes that the record does not contain pulmonary function studies, and that, as a result, it is impossible to determine whether the miner suffered impairment of lung function as a result of pneumoconiosis. However, Dr. Rasmussen states that the anecdotal information available indicates a significant limitation in the miner's ability to exercise and work. Dr. Rasmussen points out that Dr. Kress is unable to exclude a respiratory cause for the miner's shortness of breath, and that the minimal level of arteriosclerosis was insufficient to produce shortness of breath. Dr. Rasmussen

connected the miner's shortness of breath and productive cough to a respiratory impairment which precluded the miner from performing his former coal mine duties. Finally, Dr. Rasmussen states that the anatomical evidence is insufficient to establish or disconnect a link between the miner's symptoms and pneumoconiosis; however, the miner did suffer from significant respiratory impairment prior to his death. Dr. Rasmussen is board certified in internal medicine.

The employer retains the burden of rebuttal, but has not produced evidence tending to show that the miner's disability at the time of his death was not due to pneumoconiosis. Rather, the evidence remains equivocal. The most persuasive opinion of record is that of Dr. Rasmussen. Dr. Rasmussen concludes that the absence of objective medical evidence precludes a finding pertaining to the miner's respiratory disability, while the anecdotal evidence supports a finding of impairment. Therefore, rebuttal cannot be established on the basis of no pneumoconiosis related impairment.

CONCLUSIONS OF LAW

Based on the foregoing discussion of the evidence, in accordance with the Board's Decision and Order remanding the case to me for that purpose, I conclude that (1) § 727.204 applies to claimant's application for benefits under the Act; (2) Claimant invoked the presumption of entitlement at that section; (3) Employer failed to rebut the § 727.204 presumption, and (4) Claimant is entitled to benefits under the Act.

Attorney's Fees

No award of attorney's fees for services to the claimant is made herein since no application therefor has been received. Thirty days is hereby allowed to claimant's counsel for the submission of such an application and his attention is directed to §§ 725.365 and 725.366 of the regulations. A service sheet showing that service has been made upon ll parties,

including the claimant, must accompany the application. Parties have ten days following receipt of any such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

On remand from the Benefits Review Board,

ORDER

IT IS ORDERED that the claim for benefits filed by Evelyn Milliken is Granted. Youghiogheny & Ohio Coal Company is ORDERED to pay to the claimant all benefits to which she is entitled under the Act and regulations.

/s/ GEORGE P. MORIN
Administrative Law Judge

GPM/jwc/lab

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W.. Room N-2605, Washinglon, D.C. 20210.

APPENDIX D

U.S. Department of Labor
Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB Nos.93-1529 BLA
and 93-1539 152-BLA/A
OWCP No. 282-05-5402

EVELYN MILLIKEN
(Widow of HAROLD G. MILLIKEN)
Claimant-Petitioner/
Cross-Respondent,

v.

YOUGHIOGHENY & OHIO COAL COMPANY
Employer-Respondent.
Cross-Petitioner

DIRECTOR, OFFICE OF WORKERS
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR
Party-in-Interest

DATE ISSUED: JUN 21, 1995

DECISION and ORDER

Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order—Denying Modification (91-BLA-2770) of Administrative Law Judge George P. Morin on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found claimant's petition for modification to be timely filed and that he had jurisdiction over the claim. The administrative law judge, however, found that Administrative Law Judge W. Ralph Musgrove's failure to apply the 20 C.F.R. §727.204 presumption in the initial Decision and Order, dated January 16, 1986, was a mistake of law and, therefore, was not proper grounds for modification.[1] Accordingly, the administrative

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[1] The procedural history of this case, in part, is as follows. Claimant filed her application for benefits on August 5, 1977, Director's Exhibit 1, which was in interim pay status, Director's Exhibit 18, at the time the case was transferred to the Office of Administrative Law Judges for a formal hearing. Administrative Law Judge W. Ralph Musgrove, considering the case under 20 C.F.R. §727.203, denied benefits finding that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). On appeal, the Board reversed the administrative law judge's denial of benefits, holding that claimant was entitled to the benefit of the interim presumption set forth at 20 C.F.R. §410.490 and that the evidence was insufficient to establish rebuttal of the interim presumption. In addition, the Board noted that, in light of its decision under Section 410.490, the Board need not address the administrative law judge's findings pursuant to Section 727.203. *Milliken v. Youghiogheny & Ohio Coal Co.*, BRB No. 86-434 BLA/A (Jan. 29, 1988) (unpub.)

The United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case lies, reversed the Board's award of benefits, holding that the presumption set forth at Section 410.490 is not applicable in this claim and reinstated the administrative law Judge's findings pursuant to Section 727.203. The court affirmed the administrative law judge's finding of rebuttal of the interim presumption at Section 727.203(b)(3) and his denial of benefits as supported by substantial evidence. *The Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989). Claimant filed a Petition for Rehearing on

law judge denied claimant's petition for modification. On appeal, claimant challenges the administrative law judge's denial of modification, asserting that this case involves a mistake in a determination of fact and not a mistake of law, as determined by the administrative law judge. In response, employer urges affirmance of the a administrative law judge's denial of modification. On cross-appeal, employer challenges the administrative law judge's determinations that the petition for modification was timely filed and that the administrative law judge has jurisdiction to decide modification where the original claim was ultimately decided by a United States Court of Appeals. In her reply brief, claimant urges the Board to reject employer's procedural arguments and reasserts arguments from her Petition for Review and Brief. The Director, Office of Workers' Compensation Programs, filed a letter stating that she will not file a response brief in this appeal.

The Board's scope of review is defined by statute. The adinistrative law judge's Decison and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address the procedural and jurisdictional issues raised in employer's cross-appeal. Employer contends that

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February 14, 1989, requesting the court to review the case pursuant to 20 C.F.R. §727.204. Director's Exhibit 23. Employer responded to claimant's Petition for Rehearing, urging denial of claimant's request. Director's Exhibit 24. The court summarily denied claimant's petition, Director's Exhibit 25, and entered its judgment by mandate on March 23, 1989. On February 5, 1990, claimant informed the Office of Workers' Compensation Programs of her intent to formally petition for modification of her denied claim. Director's Exhibit 26.

the petition for modification in this case was not timely filed, asserting that the proper date to calculate the one-year filing limitation is January 23, 1989, the date of the decision of the United States Court of Appeals for the Sixth Circuit. We disagree. The administrative law judge properly found that, pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the timely filing of a petition for rehearing will stay the mandate of the circuit court's decision. 28 C.F.R. F.R.APP.P. 41. If, as in this case, the petition is denied, the mandate shall issue seven (7) days after entry of the order denying the petition, unless the time is shortened or lengthened by the court.. *Id.* in this case, the judgment was issued by mandate on March 23, 1989, eight days after the denial of claimant's petition. *See* Decision and Order at 8.

Contrary to employer's contention, absent explicit instruction by the Sixth Circuit court, the denial of claimant's petition for rehearing did not cause the judgment date to revert to the original decision date of January 23, 1989. Rather, the court retained jurisdiction over the case until March 23, 1989, wherein the judgment was issued by mandate. *See* 28 U.S.C. F.R.APP.P. 41; *see generally Boston' and Maine Corp. v. Town of Hampton*, 7 F.3d 281 (1st Cir. 1993). Consequently, the appropriate date to measure claimant's one year limitation to file a petition for modification is March 23, 1989. *See 20* C.F.R. §§725.309, 725.310; *see generally Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984); *Garcia v. Director, OWCP*, 12 BLR 1-24 (1988).

Furthermore, contrary to employer's contention, claimant's February 5, 1990 letter to Claims Examiner Michael McClaran is sufficient notification of claimant's intention to request modification of her denied claim, by stating that the formal petition for modification was being prepared for filing

with the district director.[2] *See* Director's Exhibit 26. A request for modification need not be formal in nature, but need only be written notice on behalf of claimant evidencing an intention to make a request for modification, as provided in this case by claimant's counsel. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *see also Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989); *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974). Consequently, we affirm the administrative law judge's determination that claimant's petition for modification, as evidenced by the February 5, 1990 letter, was timely filed with the Department of Labor. 20 C.F.R. § 725.310, *Stanley, supra; Serals, supra*

Employer further challenges the administrative law judge's jurisdictional right to order modification of a case wherein the last decision was issued by a circuit court, asserting that a lower tribunal does not have the power to modify the decision of a higher tribunal. The administrative law judge found that he is not barred by the regulations from modifying the decision of the United States Court of Appeals for the Sixth Circuit. Decision and Order at 8.

Employer's reliance on *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987) and *Director, OWCP v. Peabody Coal Co.* [Sisk], 837 F. 2d 295, 11 BLR 2-31 (7th Cir. 1988), for the proposition that administrative law judges, are barred from modifying decisions rendered by a circuit court is misplaced. The Seventh Circuit in Sisk and the Sixth Circuit in *Mazzulli* were interpreting specifically Section 22 of the Longshore and Harbor Workers'

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[2] We note that the regulations have substituted the term "district director" for "deputy commissioner" which is used in the statute. *See* 20 C.F.R. § 725-101(a)(11). The change in title is for administrative purposes only. *Id.* The official designated under 20 C.F.R. § 725.350 to develop, process and adjudicate claims under the Act is now referred to as the district director instead of the deputy commissioner. *Id.*

Compensation Act, 33 U.S.C. §922, and Section 725.310 of the Black Lung Act, 20 C.F.R. § 725.310, regarding the role of the district director, *see* discussion, *supra* at n.2, in modification proceedings. In those cases, the courts held that the district director was not empowered to modify the factual determinations of an administrative law judge because Section 22 specifically states that a district director may only modify a mistake in a determination of fact by the district director. [3] *Mazzulli, supra*; *Sisk, supra*. Employer's reliance of these cases is misplaced.

We note that employer correctly states that the court in *Sisk* concludes that an error should be corrected by the official responsible for the error or a higher authority. *Sisk*, 837 F.2d at 299, 11 BLR at 2-35. This finding, however, is not inconsistent with our holding that the administrative law judge is the proper official to consider the petition for modification since it is an erroneous finding rendered by an administrative law judge which is at issue in this proceeding, *see* disussion, *infra*. Consequently, the administrative law judge determinded properly that the regulations do not bar him from ordering modification of a claim which has been

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[3] Specifically, the Seventh Circuit in *Sisk* based this conclusion on the functions of the different levels of the adjudicatory process. The court noted that the district director was no longer the primary fact-finder under the Act. Rather, his duties are administrative in nature. Interpretation of facts were transferred to administrative law judges as the officials now empowered to conduct hearings. *See* 33 U.S.C. § 919(a)-(d); *see also* 20 C.F.R. §§725-350, 725.351, 725.450, 725.451. Therefore, the court concluded that it was not proper for the district director, as an administrative official, to correct the error of another step in the administrative process, specifically an error by the administrative law judge. *Director, OWCP* v. *Peabody Coal Co.* [Sisk], 837 F.2d 295, 299, 11 BLR 2-31, 2-35 (7th Cir. 1988). *See also Director, OWCP v. Jourdan*, 975 F.2d 1286, 17 BLR 2-9 (7th Cir. 1992), *Director, OWCP v. Drummond Coal Co.* [*Cornelius*], 831 F.2d 240, 10; BLR 2-322.(11th Cir. 1987).

before the Sixth Circuit or the Board. *See* 20 C.F.R. § 725.310; 33 U.S.C. § 922.

Addressing the merits of this case, claimant challenges the administrative law judge's denial of modification, asserting that the instant case involves a mistake in a determination of fact and does not involve a mistake of law as found by the adminstrative law judge. The administrative law judge, in addressing claimant's petition for modification, found the grounds relied on by claimant, the applicability of the presumption set forth at Section 727.204, were based on a mistake of law and, therefore, were not the proper bases for requesting modification. Decision and Order at 8-9.

Subsequent to the issuance of the administrative law judge's decision, the Sixth Circuit addressed the standards applicable to modification under Section 725.310 *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). The court, citing to the decision of the United States Court of Appeals for the Fourth Circuit in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), held that once a request for modification has been filed, regardless of the grounds stated, if any, the district director must consider all the evidence for any mistake of fact or change in conditions. Included in the determination of a mistake of fact is the determination of the ultimate fact, which is Claimant's entitlement to benefits. *Worrell*, 27 F.3d. at 230, 18 BLR at 2-296; *see also Jessee, supra*; *Amax Coal Co. v. Franklin*, 957 F.2d 355F 16 BLR 2-50 (7th Cir.1992); *Eifler v. Director, OWCP*, 926. F.2d 663, 15 BLR 2-1 (7th Cir. 1991). Moreover, the Board has consistently held that where a case involves a mixed question of law and fact, it is properly subject to modification proceedings. *See generally Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17

BRBS 183 (1985); *Presley v. Tinsley Maintenance Service*, 9 BRBS 588 (1979), *Franklin, supra.*[4]

In view of the Sixth Circuit's holding in *Worrell* and the availability of modification where the grounds present a mixed question of law and fact, we note Judge Musgrove's error in the initial Decision and Order, dated January 16, 1986, in failing to apply the presumption set forth at Section 727.204, *see* Section 411 (c) (5) of the Act, 30 U.S C. § 921(c)(5), in this survivor's claim, wherein the miner was credited with greater than twenty-five years of coal mine employment prior to June 30, 1971, and the miner's date of death was prior to March 31, 1978, 20 C.F.R. § 727.204(a). Inasmuch as the miner met the regulatory criteria for invocation of the Section 411(c)(5) presumption, the case should have been considered intially under this presumption. 20 C.F.R. § 727.204; *see Begley v. Consolidation Coal Co*, 826 F.2d 1512, 10 BLR 2-265 (6th Cir. 1987); *Fugate v. Falcon Co.*, 12 BLR 1-59 (1988) (en banc). Moreover, the applicability of Section 727.204 was presented and argued before Judge Musgrove at the outset of this case. Based on *Worrell* and the availabilty of modification in cases where the issue is a mixed question of law and fact, such as this case where the applicable regulations have been mistakenly

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[4] Specifically, the United States Court of Appeals for the Seventh Circuit in *Amax Coal Co. v. Franklin*, 957 F.2d. 355, 16 BLR 2-50 (7th Cir. 1992, stated that:

> "mixed question[s] of fact and law". . . for many legal purposes (appellate review, for example) . . . though they are not facts in the lay sense but are instead the outcome of applying legal standards to facts, are treated like facts, and one of these purposes we think should be that of deciding whether a black lung case can be reopened. This conclusion is consistent with the Supreme Court's holding in *O'Keeff v. Aerojet General Shipyards, Inc.*, 404 U.S. [254,] 256 [(1971)], that the reopening provision is to be interpreted generously to the claimant . . .

Franklin, 957 F.2d at 358, 16 BLR at 2-54.

interpreted, we vacate the administrative law judge's denial of modification. *Worrell, supra; see generally Presley, supra.* Consequently, we remand this case to the administrative law judge for further consideration of all the relevant evidence, specifically, the evidence submitted in the original case and the new evidence submitted with the petition for modification, pursuant to Section 727.204. 20 C.F.R § 727.204; *Worrell, supra; see Napier v. Director, OWCP*, 17 BLR 1-111 (1993).

Accordingly, the administrative law judge's Decision and Order Denying Modification is affirmed in part, vacated in part and the case remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

/s/BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/Roy P. Smith
Administrative Appeals Judge

/s/Nancy S. Dolder
Administrative Appeals Judge

APPENDIX E

U.S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center
Pittsburgh, Pennsylvania 15220

Case No. 91-BLA-2770
OWCP No. 280-16-3837

In the Matter of EVELYN MILLIKEN
(wid. of Harold G. Milliken)
Claimant

v.

YOUGHIOGHENY & OHIO COAL CO.
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

DATE ISSUED: Apr 15 1993

DECISION AND ORDER—DENYING MODIFICATION

This proceeding arises from a claim for benefits under the Black Lung Benefits Act of 1969, as amended, 30 U.S.C. §901 *et seq.* In accordance with the Act and the regulations issued thereunder, the case was referred by the Director, Office of Workers' Compensation Programs, to the Office of Administrative Law Judges, on August 30, 1991, for a formal hearing. (DX 34) [1]

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[1] The following abbreviations will be used when citing to the record:

Benefits under the Act are awardable to miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of miners whose deaths were caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as "black lung."

A formal hearing was held before the undersigned on April 21, 1992, in Wheeling, West Virginia, at which all parties were afforded full opportunity in accordance with the Rules of practice and Procedure (29 C.F.R. Part 18) to present evidence and argument as provided for in the Act and the regulations issued thereunder, set forth in Title 20, Code of Federal Regulations, Parts 410, 718, 725 and 727.

ISSUES

I. Whether the request for modification was timely filed;

2. Whether the deceased miner had pneumoconiosis;

3. Whether the deceased miner was partially disabled;

4. Whether the presumption of entitlement at 20 C.F.R. §727.204 applies in this case;

5. Whether the administrative law judge has authority to modify the decision rendered by of the Sixth Circuit Court of Appeals in this case;

6. Whether a mistake in a determination of fact occurred or whether there has been a change in conditions; and

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DX - Director's exhibit
CX - Claimant's exhibit
EX - Employer's exhibit
ALJX - Administrative Law Judge's exhibit
TR - Transcript of hearing

7. Whether liability for payment of benefits transfers to the Black Lung Disability Trust Fund pursuant to Section 205(a)(1) of the Black Lung Amendments of 1981.

Procedural History

Evelyn R. Milliken filed her claim for black lung benefits on August 5, 1975, following the death on July 19, 1975, of her husband, Harold Milliken, who had been a coal miner for approximately 40 years. Following two informal denials by the District Director, on January 13, 1976, and August 5. 1977, a timely controversion by the responsible operator, the Y & O Coal Company, and the submission of additional information, claimant was advised on September 23, 1980, that she had been found to be initially entitled to benefits. Following the employer's refusal to initiate payment of benefits, claimant was told that she would be paid interim benefits from the Black Lung Disability Trust Fund. (DX 18) Thereafter, following an unsuccessful attempt to be removed as responsible operator, pursuant to Section 205 of the Black Lung Amendments of 1981, employer sought and was granted a hearing before an administrative law judge.

A hearing was held before Administrative Law Judge W. Ralph Musgrove on July 17, 1985. Following the evidentiary phase of the hearing, counsel for the claimant, James L. Nichelson, Esq., argued that since the miner had worked for 25 years in one or more coal mines prior to June 30, 1971, and had died prior to March 1, 1978, the widow was entitled to the presumption of entitlement found at 20 C.F.R. §727.204 of the regulations. Employer simply argued that claimant had failed to prove that the miner was disabled due to pneumoconiosis. The judge requested post-hearing memoranda of law from the parties on the applicability to the case at bar of the Benefits Review Board's decision in *Pyle. v. Allegheny River Mining Company*, 2 BLR 1-1143. Neither party felt *Pyle* had any applicability, and both continued to

argue that the § 727.204 "widow's presumption" was the pertinent regulation under which the case should be decided.

Judge Musgrove determined that the case fell within the applicability of the Part 727 regulations generally, but specifically the regulation at § 727.203(a), which provides for a rebuttable presumption of total disability due to pneumoconiosis to miners who have worked for 10 or more years in the nation's coal mines, and to the survivors of such miners, and whose claims were filed before March 1, 1980. He found the presumption invoked pursuant to subsection (a)(1) on the basis of autopsy findings of the presence of the disease. However, based on the finding of a reviewing physician that the pneumoconiosis found at autopsy was exceedingly mild, the judge found the presumption rebutted pursuant to rebuttal subsection (b)(3). The judge next considered the case under subpart D of Part 410 of the regulations, and again found that the claimant had failed to prove her entitlement. Although the judge never once referred specifically to the § 727.204 presumption, The final sentence of his discussion does read as follows:

> "The evidence as a whole rebuts any presumption of disability due to pneumoconiosis or death due to pneumoconiosis which may be applicable in this case, and the claimant is therefore not entitled to benefits"

Sometime between the date of service of Judge Musgrove's decision and the last day for filing a notice of appeal to the Benefits Review Board, claimant ceased being represented by an attorney. So, *pro se,* claimant filed a notice of appeal with the Benefits Review Board and, at the Board's direction, a handwritten letter setting forth in layman's language the reasons she disagreed with the administrative law judge's decision. Although the Board stated in its January 29, 1988 Decision and Order that as this was an appeal filed by a claimant without an attorney it would apply the general standard of review, the majority's decision, reversing the

administrative law Judge's denial of benefits, was based entirely on its *sua sponte* consideration of claimant's entitlement to the presumption at 20 C.F.R. § 410.490(b)(1)(i) and of the employer's failure to rebut it. The dissent would have affirmed the finding of rebuttal and remanded the case to the administrative law judge for his initial consideration of the evidence relevant to the criteria at Section 410.490.

The employer appealed the award of benefits to the United States Circuit Court of Appeals for the Sixth Circuit and claimant, once more represented by an attorney, replied. Both parties confined their argument to the applicability of the Part 410.490 criteria to this claim. Employer, and the Director in a separate brief, argued that the Board erred in applying the Part 410 criteria to this Part C claim, while claimant urged affirmance of the Board's decision. None of the parties discussed the applicability of § 727.204 to this case, and neither did the Sixth Circuit in its lengthy opinion which concluded that because the miner had in excess of 10 years of coal mine employment, as to this claimant, the criteria of the Part 727 regulations are not more restrictive than those that were in effect under the Secretary of Health and Human Welfare's regulations in Part 410. Accordingly, the Court of Appeals reversed the Benefits Review Board and reinstated the administrative law judge's order. *The Youghiogheny and Ohio Coal Company v. Milliken, et al.,* 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989).

The court's decision was filed January 23, 1989. On February 14, 1989, claimant's new attorney, Gregory M. Kostelac, Esq., filed on his client's behalf (1) a Motion for Stay of Mandate of January 23, 1989, (2) a Motion for an Enlargement of Time and (3) Petition for Rehearing (in order to argue, and for the court to consider, the applicability to this case of the § 5727.204 presumption). As instructed to do by the Sixth Circuit, employer responded to these several pleadings. Most of the points raised by the parties in these

pleadings are currently before me and will be discussed in detail at the appropriate time. Suffice it to say that the Sixth Circuit denied all of the motions in its order entered March 15, 1989, which was "Issued as Mandate: March 23, 1989."

By letter dated February 5, 1990, claimant's counsel advised a claims examiner at the Columbus, Ohio, OWCP office that a Petition for Modification was at that time in the process of being prepared. The OWCP office at first advised that no modification could be sought as the one year period starting from January 23, 1989, the date the Sixth Circuit's iudgment was entered, had elapsed, but later, after being advised of the pleadings filed post-judgment, it agreed that a petition for modification could still be filed.

Attorney Kostelac's March 28, 1990 letter to Claims Examiner McClaran incorporates by reference the allegations made in his Petition for Rehearing to the Sixth Circuit and in his February 5, 1990 letter indicating his intention to file a petition for modification. The letter states that the petition ". . . neither reargues previously litigated facts nor does it offer any newly discovered evidence . . . [but] raises the very critical issue of this claim being a widow's presumption case that was never treated as such! . . . [W]e request that the Deputy Commissioner act upon our February 5, 1990 Request for Modification on the basis that the proceedings to date were in error, that the claim is and always has been reviewable under 20 C.F.R. 727.204 as the widow's presumption was not rebutted.

Unfortunately, the District Director's order denying modification is missing from the file, but it would appear that following service of such an order, claimant requested a hearing before an administrative law judge. An informal conference, attended by the Acting District Director and the same counsel for the parties who appeared at the April 21, 1992 hearing, was held on August 31, 1990, in Cadiz, Ohio, with the upshot being that the District Director affirmed his

prior denial of modification, citing his extreme reluctance to modify the Court of Appeals decision.

Owing to the state of the law at the time, the matter did not then go to the Office of Administrative Law Judges to be heard, in accordance with claimant's request. Instead, it went directly to the Benefits Review Board. Before the matter could be acted upon, however, the law relative to the issue of jurisdiction to act on appeals from the District Director's denial of modification was clarified, and the Benefits Review Board relinquished jurisdiction. The case was returned to the District Director who, on August 30, 1991, forwarded the case to the office of Administrative Law Judges for a formal hearing. (The matters alluded to in this paragraph are of no importance to resolution of the issues in this case and, accordingly, have not been discussed in any great detail.)

Summary of Evidence Adduced at April 21, 1992 Hearing

Claimant testified that she and the deceased miner, Harold Milliken, were married January 13, 1934 and that they remained married until his death on July 19, 1975. For the last five years of his life, his health was poor. He experienced breathing difficulties, including a persistent cough and an inability to walk even short distances on the level without becoming short of breath. (TR 14) He also reduced his activities, which included eliminating fishing and hunting and avoiding climbing the stairs leading to the second floor of their home. The miner was injured in an accident at work. The injuries consisted of three broken ribs and these continued to cause him pain for the rest of his life. Other than for treatment of the broken ribs, the miner was not hospitalized during the last 10 years of his life and he was taking no medications. On cross-examination, claimant admitted that she had testified at the prior hearing before Judge Musgrove and that she was represented by an attorney, James Nichelson, Esq., at that hearing.

The only other witness to testify at the hearing was Mr. Dominic Ferri, who knew the deceased miner throughout his 27 years of employment with the Y & O Coal Company. Both the deceased miner and Mr. Ferri worked above ground at and around the preparation plant. From the tower where he worked he was able to observe Mr. Milliken walking to and from his car to the front-end loader he worked on. Mr. Milliken, in the latter years of his employment, was seen to stop once or twice in the course of walking the 200 to 250 feet from his car to the place where the front-end loader was parked.

At claimant's request, Dr. D.L. Rasmussen reviewed medical records and other documents from the time of, and prior to, the initial hearing herein in 1985. He agree with pathological findings made by other physicians confirming the presence of pneumoconiosis. Recognizing that there were no pulmonary function studies done on the living miner, Dr. Rasmussen relied on "anecdotal information" to conclude that the miner experienced shortness of breath during his lifetime which, he opines, could have been caused by lung disease, as opposed to other causes suggested by Dr. Kress in his report. From descriptions of the degree of pulmonary impairment he read, Dr. Rasmussen considers it to be a reasonable conclusion that the miner had a pulmonary impairment which would prevent him from performing his last regular coal mine employment with its attendant requirement for at least minimal heavy manual labor. However, in a concluding paragraph, Dr. Rasmussen, confining himself to the anatomical evidence in the case, stated that there was no way to prove or disprove the association between the miner's shortness of breath with exertion and his coalworkers' pneumoconiosis. Dr. Rasmussen's *curriculum vitae* was placed in the record and indicates that he is Board certified in internal medicine and that he has served as a member of a number of task forces and committees dealing with

pneumoconiosis and other health problems associated with the production and burning of coal. (CX 1)

Employer presented no testimony of witnesses. Employer's Exhibits 1 through 5 were received. They consist in their entirety of documents and excerpts of the transcript from the first hearing, all of which are contained in the Director's exhibits.

Contentions of the Parties

At the court's direction, both parties submitted post-hearing briefs setting forth their respective positions on the issues. Claimant maintains that her request for modification, which was filed within one year of the date of the mandate of the Sixth Circuit Court of Appeals, is based upon ". . . both a mistake of law and fact." As heretofore discussed in the procedural history, neither the first administrative law judge, the Benefits Review Board nor the Circuit Court of Appeals alluded to that subsection specifically as an issue in the case. Claimant argues that when it is considered in the context of § 727.204, Dr. Rasmussen's expert opinion provides the only professional basis for finding that the employer has failed to disprove even the presence of partial disability due to coal workers' pneumoconiosis.

With respect to the issue of whether an administrative law judge has jurisdiction to modify the decision of the Sixth Circuit Court of Appeals, claimant simply maintains that she doesn't seek to modify any of the *conclusions* reached by that court but merely to have the proper legal standard applied to the facts in her case, something that has been denied her *ab initio*. She stresses that her chances of establishing entitlement under §727-204 are greatly increased, given that section's more difficult burden for employer to establish rebuttal as compared to the erroneously applied §727.203(b) standard. Applying the medical evidence of record to the § 727.204 rebuttal standard, she concludes, will result in a

finding of entitlement. She urges that Dr. Kress' opinion be discarded because the views expressed by the doctor concerning simple pneumoconiosis never being totally disabling are contrary to the Act, and also that Dr. Rasmussen, an active, clinical physician, be found to be better qualified than Dr. Kress, who has not treated patients for a number of years.

Employer argues six bases, some procedural, some substantive, for denying this petition for modification. First, with respect to timeliness, employer maintains that under the Federal Rules of Appellate Procedure (Rule 40), a party has only 14 days to petition for rehearing, and that claimant's three motions (Stay of Mandate, Enlargement of Time, and for Rehearing), filed February 14, 1989, were clearly beyond the 14 days, which began running from the date of the Sixth Circuit's judgment entered January 23, 1989. Still on timeliness, employer maintains that claimant's letters of February 5, March 9, and March 28, 1990, cannot be considered as petitions for modification as in none of them does claimant address a mistake in a determination of fact or a change in condition.

Employer further argues that even if the letters filed by claimant be considered as somehow constituting a timely filed petition for modification, an administrative law judge lacks jurisdiction to modify the decision of the Sixth Circuit Court of Appeals, the general principle being that a lower adjudiciatory tribunal has no jurisdiction to modify a higher adjudicating tribunal's decision. Furthermore, employer argues, the fact that an alleged applicable presumption was not considered does not constitute good cause for reopening a final denial. Employer analogizes claimant's position to that of the unsuccessful claimants in *Pittston Coal Group v. Sebben*, 12 BLR 2-89, (1988), who were denied relief afforded other claimants in the consolidated proceedings

because they failed to keep their cases viable by filing timely appeals.

On the substantive issues, employer relies on the language of Judge Musgrove's finding (quoted above) that claimant is not entitled to benefits, applying any presumption, to be sufficiently broad to cover the § 727.204 presumption. Employer points out that the Sixth Circuit refused to disturb the findings of the administrative law judge and thereby adopted this language and its import. Nor, concludes employer, does the evidence received at the hearing support a finding of mistake in a determination of fact or a change in conditions to warrant modification.

DISCUSSION AND CONCLUSIONS

I find the petition for modification to have been timely filed, based on the following considerations. In evidence as CX 2, is the Judgment of the United States Court of Appeals for the Sixth Circuit, filed with the Clerk of Court January 23, 1989. The document states on its face: "Issued as Mandate: March 23, 1989." Obviously, the multiple filings by claimant's then-attorney were accepted, or else the court would not have directed employer to respond to the petition for rehearing, resulting in the latter's Memorandum Contra to Petition for Rehearing. (DX 24) Rule 41 of the Federal Rules of Appellate Procedure states that the *timely* filing of a petition for rehearing will stay the mandate and that if the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition, unless the time is shortened or enlarged by order. Here, the Judgment was issued as mandate on March 23, 1989, a mere eight days after the petitions were denied. Taking March 23, 1989 as the date when the one-year period for seeking modification begins to run, the February 5, 1990 Petition for Modification was timely filed, and I so find.

Next to be decided is the question whether a lower tribunal, here the administrative law judge, may modify a decision by a

higher tribunal, in this case the Circuit Court of Appeals for the Sixth Circuit. While in the hierarchy of judicial tribunals a United States Circuit Court of Appeals occupies a lofty position, for purposes of 20 C.F.R. § 725.310 there is nothing in the regulations that would make the Sixth Circuit's decision any less subject to modification than one by the Benefits Review Board. Given the remedial nature of the Act and the fact that pneumoconiosis is a progressive disease, a fact which gives rise to the "change in conditions" language in the regulations, modification at any stage, so long as its is timely sought, is appropriate.

While claimant has passed the procedural hurdles thrown up by employer, I cannot find that she has proven a case for modification. A change in conditions is not at issue in this case involving a survivor's claim, and no credible argument has been made in support of a claim that a mistake in a determination of fact was made. All that has been argued by claimant's former and present counsel is that possibly a *mistake in law* was made and that possibly a different result would have been reached if the § 727.204 presumption had been applied in lieu of either the § 727-203(a) presumption or any of the Part 410 regulations at any of the levels where the matter was reviewed and decided.

The Board has applied the principle that mistakes of law may not be corrected by modification. In *Donadi v. Director OWCP*, 12 BLR 1-166 (1989), the Director sought *modification* of an administrative law judge's award of benefits to a working miner in disregard of the prohibition against such in § 725.503A. In denying modification, the Board stated:

> "The administrative law judge made an error of law in awarding benefits commencing on February 1, 1976, in that he failed to properly apply the criteria of 20 C.F.R. § 725-503A (citations omitted). Since the case involves neither a mistake of fact nor a change in conditions, but rather an error of law, we hold that the

> administrative law judge's error is not a proper basis for the initiation of modification procedures under Section 22 of the LHWCA, 33 U.S.C. § 922. (footnote omitted) The proper recourse for correction of this error would have been a timely appeal or motion for reconsideration, neither of which were pursued by the Director. 12 BLR 1-166 at 1-168

In the instant case, claimant's last appellate recourse was application for a Writ of Certiorari to the Supreme Court, which she failed to do when her counsel heeded some ill advice from an unnamed source that she should seek relief through a petition for modification.

Dr. Rasmussen's opinion, in evidence as CX 1, does not, of course, change a mistake of law into a mistake in a determination of fact which could be a basis for modification. Even assuming failure of the several reviewing bodies to consider the matter under § 725.204 would constitute a mistake of fact, Dr. Rasmussen's opinion, based upon his review of the medical records lacks persuasion. He expends half the space in his opinion explaining why the evidence supports a finding for the presence of pneumoconiosis, which is already an uncontested fact, and then quite unequivocally states that he cannot state that pneumoconiosis caused *any* degree of disability during the miner's lifetime. I fail to see how, as claimant's counsel argues, this opinion proves partial disability due to pneumoconiosis. But this, of course, is not the basis upon which I find that claimant has failed to prove either a change in condition or a mistake in a determination of fact. I find that the basis upon which claimant seeks reflief, that a mistake of law was made, cannot be remedied through a petition for modification under § 725-310. Accordingly,

ORDER

IT IS ORDERED that the petition for modification be, and it is hereby, denied, for the reason that claimant has failed to

prove that there has been a change in conditions or that a mistake in a determination of fact occurred, which are the only bases there are for granting modification.

/s/ George P. Morin
GEORGE P. MORIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision and Order by filing a notice of appeal with the Benefits Review 800 K Street, N.W. Suite 500,Washington, D.C. 20001-8001.

A copy of a notice of appeal must also be served on Donald S. Shire. Esq., Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Buildinq, Room N-2605, 200 Constitution Avenue N.W. Washinqton, DC 20210.

Supreme Court, U.S.
FILED
AUG - 2 2000
CLERK

(2)

No. 99-1923

In the Supreme Court of the United States

THE YOUGHIOGHENY AND OHIO COAL CO., PETITIONER

v.

EVELYN MILLIKEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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17pp

QUESTION PRESENTED

Whether the court of appeals, which had previously affirmed a decision of an administrative law judge (ALJ) denying a widow's claim to black lung benefits, erred when it affirmed a subsequent ALJ's award of benefits on modification of the original decision, pursuant to 33 U.S.C. 922 and 30 U.S.C 932(a).

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 200 F.3d 942. The September 30, 1998, decision and order of the Benefits Review Board (Pet. App. 35a-46a), the July 16, 1997, supplemental decision and order of the administrative law judge (ALJ) on remand (Pet. App. 47a-57a), the June 21, 1995, decision and order of the Benefits Review Board remanding the case to the ALJ (Pet. App. 58a-66a), and the April 15, 1993, decision and order of the ALJ denying modification (Pet. App. 67a-80a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1999. A petition for rehearing was

denied on March 2, 2000. The petition for writ of certiorari was filed on May 31, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1975, respondent Evelyn Milliken filed a claim for survivor's benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, based on the death of her husband, Harold Milliken, who had worked in coal mines for approximately forty years before he retired in 1973. Pet. App. 2a. Petitioner Youghiogheny and Ohio Coal Company contested Milliken's claim, and a hearing was held before an ALJ. *Id.* at 48a. Concluding that petitioner had successfully rebutted Milliken's presumption of entitlement to benefits under 20 C.F.R. 727.203, the ALJ denied benefits. Pet. App. 48a. Although Milliken had also argued that she was entitled to benefits based on the widow's presumption, set forth at 30 U.S.C. 921(c)(5) and 20 C.F.R. 727.204, under which a widow is presumed entitled to benefits if her husband died before March 1, 1978, and worked at least 25 years in coal mines before June 30, 1971, the ALJ did not address her entitlement under that provision. Pet. App. 48a.

Milliken appealed pro se, and the Benefits Review Board awarded her benefits. The Board concluded that the presumption in 20 C.F.R. 410.490, rather than the presumption in 20 C.F.R. 727.203(b), was applicable, and that petitioner had not successfully rebutted the applicable presumption. Pet. App. 48a. On appeal, however, the Sixth Circuit concluded that petitioner had rebutted the presumption contained in Section 410.490, and the court reinstated the ALJ's order denying benefits. *Id.* at 48a-49a. Milliken filed a motion for leave to file out of time a petition for rehearing, in

which she planned to reassert her contention that the widow's presumption was applicable, but the Sixth Circuit denied the motion. *Id.* at 6a-7a.

2. By letter dated February 5, 1990, Milliken initiated a modification proceeding. See 33 U.S.C. 922; 30 U.S.C. 932(a); 20 C.F.R. 725.310. A hearing was convened before a second ALJ. Pet. App. 7a-8a. Milliken argued that the first ALJ had erred in failing to award her benefits under the widow's presumption. *Id.* at 72a. Both Milliken and a former coworker of her husband testified about their observations of her husband's respiratory symptoms and physical limitations before his death. *Id.* at 73a-74a. In addition, Milliken submitted the written opinion of Dr. D. L. Rasmussen, who concluded, based on his review of the record, that Milliken's husband had pneumoconiosis and a disabling respiratory impairment, but that it was impossible conclusively to connect the two. *Id.* at 74a.

The ALJ issued an order denying benefits. The ALJ first concluded that the request for modification was timely and that the prior decision of the Sixth Circuit reversing the Board's grant of benefits did not preclude modification. Pet. App. 77a-78a. The ALJ nevertheless denied modification because he concluded that modification is available only to correct mistakes in fact and that Milliken was asserting a mistake in law. *Id.* at 78a-79a.

3. The Board reversed the ALJ's decision and remanded. The Board first rejected petitioner's argument that the petition for modification was untimely. Pet. App. 61a-62a. The Board also rejected petitioner's contention that the ALJ was not empowered to grant modification because the Sixth Circuit had issued a decision reinstating the first ALJ's denial of benefits. *Id.* at 62a-64a. The Board then addressed the ALJ's

conclusion that modification was unavailable to Milliken because the mistake she asserted—failure to apply the widow's presumption—was a mistake of law and not of fact. The Board noted that both the Fourth and Sixth Circuits have held that, on motion for modification, the agency must consider all the evidence bearing on the ultimate fact of claimant's entitlement to benefits. *Id.* at 64a. On the basis of those decisions, as well as Board and Seventh Circuit precedent that modification is available to correct mistakes involving mixed questions of law and fact, the Board remanded the case to the ALJ to consider Milliken's entitlement under the widow's presumption. *Id.* at 65a-66a.

4. On remand, the ALJ concluded that Milliken was entitled to benefits under the widow's presumption. The ALJ found that Milliken was entitled to the presumption because her husband died before March 1, 1978, and was employed for at least 25 years as a coal miner before June 30, 1971. Pet. App. 50a-51a. Moreover, relying on the lay testimony at the second hearing, as well as Dr. Rasmussen's report, the ALJ found that petitioner had not established that Milliken's husband was not totally or partially disabled by pneumoconiosis at the time of his death, and therefore had not rebutted the presumption. *Id.* at 51a-56a; see 20 C.F.R. 727.204(a) and (b). On appeal, the Board affirmed the ALJ's award of benefits. *Id.* at 35a-46a.

5. Petitioner sought review of the Board's decision, and the court of appeals denied its petition. Pet. App. 2a. The court concluded that "the Board affirmance was not legally erroneous and that the ALJ's decision was supported by substantial evidence." *Ibid.*

The court first rejected petitioner's contention that, because Milliken had raised the applicability of the widow's presumption before the Sixth Circuit in her

untimely petition for rehearing of the court's previous decision, she was foreclosed by the court's prior mandate from raising the issue in her request for modification. Pet. App. 9a-12a. The court reasoned that the merits of Milliken's petition for rehearing were never decided by the court "either expressly or impliedly" because she did not timely file a rehearing petition, and the court denied her motion for permission to file one out of time. *Id.* at 12a. The court also rejected various other procedural objections raised by petitioner—including that the request for modification was not timely filed, that the letter of February 5, 1990, was not adequately specific to invoke the modification process, and that Milliken had irretrievably forfeited the argument that she was entitled to the widow's presumption because she had not reiterated the argument in her pro se appeal of the ALJ's initial decision denying benefits. *Id.* at 12a-20a.

On the merits, the court of appeals, relying on *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) (per curiam), held that 33 U.S.C. 922 empowered the ALJ to reweigh the evidence on request for modification, "regardless of whether the issue of disability due to pneumoconiosis is labeled one of 'law,' 'fact,' or 'ultimate fact.'" Pet. App. 22a. The court was not persuaded by petitioner's contention that such a rule would open the floodgates of litigation. The court viewed that prospect as unlikely because agency adjudicators have discretion to refuse requests for modification. *Id.* at 22a-23a. The court further noted that, "[o]nce a year has passed, the time for modification has run and res judicata will bar subsequent challenges to the correctness of the adjudication." *Id.* at 23a. In any event, the court explained, it did not

have authority to "amend the statute or disregard the way the Supreme Court has interpreted it." *Id.* at 22a.

Judge Wellford dissented based in part on his view that, in denying Milliken's petition for rehearing in 1989, the court of appeals had "considered and rejected the arguments advanced," including Milliken's entitlement under the widow's presumption. Pet. App. 27a-28a. In addition, Judge Wellford concluded that Milliken's letter of February 5, 1990, was not adequately specific to constitute a modification request. *Id.* at 29a-31a. Moreover, Judge Wellford viewed Dr. Rasmussen's report as cumulative of the prior evidence, and therefore he "would not disturb the earlier fact findings and conclusions of the ALJ in 1986 and this court's judgment." *Id.* at 33a-34a.

ARGUMENT

The court of appeals correctly held that the ALJ could modify the prior ALJ's decision to deny benefits.[1] That holding does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Section 22 of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. 901 *et seq.*, provides:

> Upon his own initiative, or upon the application of any party in interest * * *, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of

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[1] The petition does not raise, and we do not address, the questions whether Milliken's modification request was timely or adequately specific. See Pet. i.

> compensation, * * * or at any time prior to one year after the rejection of a claim, review a compensation case * * * [and] issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. 922. That provision is incorporated into the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, by 30 U.S.C. 932(a) and is reiterated in a regulation that the Secretary of Labor has promulgated under the BLBA. 20 C.F.R. 725.310.

The deputy commissioner, now called the district director, 20 C.F.R. 725.101(a)(11), is the Department of Labor's initial adjudication officer for black lung claims, see 20 C.F.R. 725.350(b). The 1972 amendments to the Longshore Act, however, removed the authority of district directors to conduct hearings and transferred that authority to ALJs. See 33 U.S.C. 919(d). All powers vested in the deputy commissioners with respect to such hearings were transferred to the ALJs. *Ibid.*; see *Eifler* v. *OWCP*, 926 F.2d 663, 665-666 (7th Cir. 1991).

Thus, Section 22, as implemented by the Secretary of Labor, alters the ordinary principles of res judicata by providing that "[u]nsuccessful black lung claimants may, within a year of the final order, request modification of the order." *Jessee* v. *Director, OWCP*, 5 F.3d 723, 724 (4th Cir. 1993); see also *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 462-465 (1968). Moreover, as this Court has held, Section 22 vests the factfinder with "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe* v. *Aerojet-*

General Shipyards, Inc., 404 U.S. 254, 256 (1971) (per curiam).

Consistent with Congress's intent that modification be available whenever "desirable in order to render justice under the act," *Banks*, 390 U.S. at 464 (quoting S. Rep. No. 588, 73d Cong., 2d Sess. 3-4 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess. 4 (1934)), courts uniformly have concluded that any factual mistake may be corrected, including the ultimate issue of entitlement to benefits. See, *e.g.*, *O'Keeffe*, 404 U.S. at 255; *Banks*, 390 U.S. at 464-465; *Keating* v. *Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995); *Consolidation Coal Co.* v. *Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Jessee*, 5 F.3d at 725; *Amax Coal Co.* v. *Franklin*, 957 F.2d 355, 358 (7th Cir. 1992). It is thus well established that the Longshore and Black Lung Acts have "perhaps the most permissive 'mistake' reopening rule on record." 3 Arthur Larson, *Larson's Workers' Compensation Law* § 131.05(2)(b), at 131-158 (2000). The court of appeals here correctly applied that settled rule to the facts of this case.

2. Petitioner contends (Pet. 8-14) that the court of appeals misread *O'Keeffe* in affirming the ALJ's grant of benefits on modification when the original decision rejecting the claim had been reviewed by the court of appeals. Petitioner reasons that, because the denial of benefits that was modified in *O'Keeffe* had not been reviewed by another tribunal, only denials of benefits that have not been reviewed may be modified under Section 22, at least "[a]bsent some change of circumstances that renders the new claim somehow different." Pet. 12.

Nothing in *O'Keeffe*, however, suggests that modification of a decision under Section 22 is barred when the decision has been reviewed by another tribunal. And,

contrary to petitioner's suggestion that the availability of modification turns on a "change of circumstance[s] that renders the new claim somehow different" (Pet. 12), the Court in *O'Keeffe* expressly rejected the contention that Section 22 modifications are limited to "cases involving new evidence or changed circumstances." 404 U.S. at 255; accord *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 295-296 (1995).

Petitioner nonetheless contends (Pet. 12) that, unless *O'Keeffe* is limited to its facts, modification will run afoul of "longstanding principles of claim preclusion" and "policies against piecemeal adjudication." As a result of Section 22, however, "the 'principle of finality' just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits." *Jessee*, 5 F.3d at 725 (citing *Banks*, 390 U.S. at 461-465). That is not to say that Section 22 eliminates finality for such claims, but, as this Court recognized in *O'Keeffe*, Section 22 "set[s] a different time limit for a redetermination of fact." See 404 U.S. at 256.

Petitioner also misses the mark in asserting (Pet. 12) that the court of appeals' reading of *O'Keeffe* disregards "the authority of a superior adjudicative body's decision over an inferior adjudicative body." As the court of appeals explained, in its initial decision in this case, the court did not review or rule on the merits of Milliken's contention that she was entitled to have her claim considered under the widow's presumption. Pet. App. 12a. That decision therefore did not create any mandate on the issue with which the modification award could conflict. *Id.* at 11a-12a. Although the dissent disagreed with that conclusion as a factual matter (*id.* at 27a-28a), petitioner does not raise that fact-based argument in this Court.

More fundamentally, petitioner's contention that only benefit denials that have not been reviewed may be modified finds no support in the language of Section 22, which does not merely provide for modification of the claim within one year of a deputy commissioner's unreviewed denial of a claim, but instead broadly provides for modification "at any time prior to one year after the rejection of a claim." 33 U.S.C. 922. Thus, a number of courts properly have upheld modification awards where the original denial of benefits was reviewed by the Board without questioning the propriety of modification in that situation. See, *e.g.*, *Old Ben Coal Co.* v. *Scott*, 144 F.3d 1045, 1046 (7th Cir. 1998); *Keating*, 71 F.3d at 1121; *Jessee*, 5 F.3d at 724.

Petitioner's concern (Pet. 13-14) about the potential for abuse by never-say-die litigants is both overstated and misdirected. The decision of the court of appeals does no more than permit a claimant whose valid argument before the initial ALJ was overlooked to obtain reconsideration of that argument within one year of the rejection of her claim. As the court of appeals noted (Pet. App. 22a- 23a), the agency adjudicator has discretion to refuse modification; and, after one year from the final order rejecting a claim or from the last payment of benefits, modification under Section 22 is no longer available. Although petitioner may disagree with the suspension of finality until that time, Congress provided for it in Section 22. It is thus Section 22, not the decision of the court of appeals, that gives claimants more than one "bite at the apple." Pet. 13.

3. Petitioner also errs in contending (Pet. 14-15) that the decision of the court of appeals in this case conflicts with decisions of other courts of appeals. In each of the cases that petitioner cites, a district director attempted

to modify the award of an ALJ by correcting an alleged factual mistake made by the ALJ. *Director, OWCP* v. *Kaiser Steel Corp.*, 860 F.2d 377 (10th Cir. 1988); *Director, OWCP* v. *Peabody Coal Co.*, 837 F.2d 295 (7th Cir. 1988); *Director, OWCP* v. *Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987).[2] As the court of appeals explained, those cases at most stand for "the unremarkable proposition that inferior tribunals cannot refuse to obey the decisions of superior tribunals." Pet. App. 10a.

In contrast, in this case, an ALJ modified a prior ALJ decision after that decision had been reviewed by the court of appeals but without any ruling by the court of appeals on the issue that formed the basis for the modification. As the court of appeals explained (Pet.

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[2] The Fourth and the Sixth Circuits have held that a district director has the authority to initiate and propose modification of an ALJ's mistake of fact. See *Lee* v. *Consolidation Coal Co.*, 843 F.2d 159 (4th Cir. 1988); *Saginaw Mining Co.* v. *Mazzulli*, 818 F.2d 1278 (6th Cir. 1987). As discussed in the text, this case involves an ALJ's modification of another ALJ's decision; it therefore does not present an occasion to resolve any tension that may exist between the views of the Seventh, Tenth, and Eleventh Circuits on the one hand and the Fourth and Sixth Circuits on the other regarding a district director's authority to modify an ALJ's decision. In any event, the Secretary now refers all cases arising under the BLBA in which the district director has initiated modification proceedings based on an ALJ's mistake of fact to the Office of Administrative Law Judges for a hearing. See Employment Standards Admin., U.S. Dep't of Labor, BLBA Transmittal No. 94-18, *Coal Mine (BLBA) Procedure Manual*, Pt. 2, ch. 2-1302, ¶ 7.c (Sept. 1994). Thus, district directors no longer attempt to modify mistaken ALJ decisions in BLBA cases. In such cases, district directors simply initiate modification proceedings and leave for the ALJ the issue whether to modify the allegedly mistaken decision. The Secretary has proposed to codify this policy in a rule. See 64 Fed. Reg. 55,032-55,033 (1999) (proposed 20 C.F.R. 725.310(c)); 62 Fed. Reg. 3353 (1997) (preamble).

App. 12a), this case thus does not present the question whether an inferior tribunal (here the ALJ) may disregard a determination made by a superior tribunal (here the court of appeals).

Moreover, the analogy that petitioner would draw between a district director's modification of an ALJ's factual determination and an ALJ's modification of another ALJ's factual determination as affirmed by a court of appeals is flawed. The relationship between the district director and the ALJ is not comparable to the one between the ALJ and the court of appeals. Under the administrative scheme, the ALJ is an independent factfinder who has authority to find facts after a hearing. See 33 U.S.C. 919(d). In contrast, the court of appeals, like the Board, cannot find facts; it may only review whether substantial evidence supports the ALJ's factual determinations and whether the ALJ has made errors of law. *Worrell*, 27 F.3d at 230-231. Thus, whether or not a district director can reconsider a fact found by an ALJ after a hearing, it is clear that an ALJ can reconsider a fact found by another ALJ. See *Eifler*, 926 F.2d at 666. That conclusion holds true even if the ALJ's decision has been reviewed for substantial evidence and errors of law by the Board and the court of appeals.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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NATHANIEL I. SPILLER
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AUGUST 2000